Chapter XXIX.

GENERAL ELECTION CASES, 1870 TO 1875

878. The Ohio election case of Eggleston v. Strader, in the Forty-first Congress.

No fraud being shown, the House sustained the election returns, although a de facto election officer, of partisan bias and irregular conduct, officiated a portion of the time.

Distinction between election officers de jure and de facto and mere usurpers.

The Elections Committee examined a question raised in the notice of contest, although it had not been insisted on in the argument of contestant.

A small excess of votes in the box over names on the poll list does not justify rejection of a poll, no fraud being shown.

Rude conduct on the part of election officers does not necessarily constitute intimidation sufficient to vitiate the poll.

On May 23, 1870,[4] Mr. Eugene Hale, of Maine, from the Special Committee of Elections, submitted the report in the Ohio case of Eggleston *v.* Strader. The

[1] See also case of Joseph Segar, of Virginia. (Sec. 318.)

[2] Additional cases in the Forty-second Congress, classified in other chapters, are:
Bowen *v.* De Large, South Carolina. (Vol. I, sec. 505.)
McKissick, *v.* Wallace, South Carolina. (Vol. I, sec. 651.)
The Tennessee Members. (Vol. I, sec. 521.)
Whitmore *v.* Herndon, Texas. (Vol. I, sec. 600.)
Giddings *v.* Clark, Texas. (Vol. I, sec. 601.)
Boles *v.* Edwards, Arkansas. (Vol. I, sec. 605.)
McKenzie *v.* Braxton, Virginia. (Vol. I, sec. 639.)

[3] Additional cases in the Forty-third Congress:
Gunter *v.* Wilshire, Arkansas. (Vol. I, sec. 37.)
Shanks *v.* Neff, Louisiana. (Vol. I, sec. 609.)
Sheridan *v.* Pinchback, Louisiana. (Vol. I, sec. 623.)
Laurence *v.* Sypher, Louisiana. (Vol. I, sec. 623.)
The West Virginia Members. (Vol. I, sec. 522.)

[4] Second session Forty-first Congress, House Report No. 73; 2 Bartlett, p. 897.

sitting Member had been returned by a majority of 211 votes. The main issue in the contest was over the poll of the First Ward of Cincinnati, where sitting Member received a majority of 350 votes. If this poll should be rejected, as demanded by the contestant, the result would be changed.

There was no evidence that fraud was committed, but a person who presided as one of the judges was undoubtedly disqualified by reason of irregular election. The report says:

The polls were opened at about half past 6 o'clock a. m., James W. Fitzgerald, Republican, and James Malloy, Democrat, members of the city council, being present as judges of election ex officio. Mr. Fitzgerald took the lead in the proceedings, and, under his charge, Charles W. Rowland, Democrat, was chosen by the electors present, viva voce, to be the third judge of election. Three clerks were duly chosen, and the election proceeded.

The testimony shows that John C. Fiedelday, an active Democratic politician, was present at or about the polls from the time they were opened.

Between 10 and 11 o'clock Mr. Malloy left the polls because of duties elsewhere and requested that Fiedelday should act in his place. This was assented to, and he was sworn in. The substitution was confessedly irregular, there being no law authorizing such procedure. The report says:

Mr. Fitzgerald says that Fiedelday acted as judge in the absence of Malloy during the time when from five-eighths to three-fourths of the entire vote was polled, and that in disputed cases he, Fiedelday, united with Rowland, the other Democratic judge, in receiving Democratic votes to which he, Fitzgerald, believed there were valid objections; but he fixes the number of these at not over 25, to the best of his knowledge and belief, and he thinks that few or none of the proper Republican votes were rejected.

The conduct of Fiedelday during the day is shown to have been undignified, irregular, and unbecoming an officer taking any charge of an election. When he was not acting as a judge he mingled in a crowd and electioneered for Mr. Strader. He took a bet of $50 offered by one John Kissick, who rather rashly ventured his money on Mr. Eggleston. He left the polls and called back James Riley, who had once been rejected and whose right to vote was doubtful, and induced the other judges to receive the vote. He engaged in an altercation with Mr. Fitzgerald, the Republican judge, gave and took the lie, and showed a familiarity with profane language by no means commendable. He was evidently in no very judicial frame of mind.

But the committee find no proof nor even suspicion of fraud in his.conduct, nor, indeed, in the entire conduct of the poll. It was clearly conducted in a generally peaceable manner.

The contestant claimed that the whole day's proceedings were invalid, that there was no good or sufficient election board, that Fiedelday was no judge, and that his acts were the acts of an usurper.

The committee conclude:

That Fiedelday was not legally elected a judge of the election, and that he could not have held the place as against Malloy, who was an officer de jure, is clear.

But it is well settled in law that, so far as the public is concerned, the acts of one who claims to be a public officer, judicial or ministerial, under a show of title or color of right, will be sustained. Such a person is an officer in fact, if not in law, and innocent parties or the public will be protected in so considering and trusting him. This principle will not be questioned, it is believed. The highest authorities and courts have maintained it.

In case of public officers who are such de facto, acting under color of office by an election or appointment not strictly legal, or without having qualified themselves by the requisite tests, or by holding over after the period prescribed for a new appointment, as in case of sheriffs and constables, their acts are held valid as respects the rights of third persons who have an interest in them and as concerns the public to prevent a failure of justice. (2 Kent's Com., p. 295; Bouvier's Law Dictionary, de facto).

In Wilcox *v.* Smith (5 Wendall, p. 233) the court says: "The principle is well settled that the acts of an officer de facto are as valid and effectual when they concern the public or third persons as though they were officers de jure. The affairs of society could not be carried on on any other principle." To the same effect is the case of The People *v.* Cook (14 Barb. N. Y. Rep., 259). Numerous other citations from reports and elementary writers could be given if needed.

But the contestant claims that Fiedelday was not an officer or judge de facto, and his counsel has made an ingenious argument before the committee on the ground that Fiedelday was an intruder or usurper without color of right, basing his argument largely upon the view that there was no vacancy in the office of judge of elections and that there is no such officer known in Ohio as temporary judge. But he seems for the time to lose sight of the distinction between an officer de facto and an officer de jure, and some of the cases that he cites relate to the rights of claimants to offices as against other claimants which involve the question as to an officer de jure and not de facto. It takes but little to constitute an officer de facto as affects the right of the public. The exercise of apparent authority under color of right, thus inviting public trust and negativing the idea of usurpation, is sufficient.

There need have been no vacancy in the office claimed to be holden; indeed, no such office may have ever existed. The supreme court of Massachusetts decided, in Fowler *v.* Beebe (9 Mass. Rep., p. 231), that the appointment by the governor as sheriff of a county that does not exist is a colorable appointment, and makes the appointee an officer de facto, as to the public, and this though the appointment was absolutely void and not simply voidable.

It has been decided in Maine that the acts of a magistrate, under apparent right of office, will be sustained, although they were long after the commission of the magistrate had expired. (Brown *v.* Lunt, 34 Maine Rep., 423.) To constitute an individual an officer de facto he must not be a mere intruder, but must be in colore officii. There must be some color of an election or appointment, or such an exercise of the office, and an acquiescence on the part of the public, as would afford a reasonable presumption of at least a colorable election or appointment. In the case of the People *v.* Cook (14 Barbour, New York Rep., 289) the entire question as to what will constitute an officer de facto is discussed.

The report, after discussing the case in question, refers to certain Ohio cases, and then proceeds to refer to cases of the House itself. The committee admit that the House has sometimes apparently departed from the strict rule, but it is pointed out that in such cases the element of fraud was always present. The report concludes:

On these decisions, and seeking to give effect to the expressed voice of the people, as shown in the whole vote of the First Ohio district, the committee are dearly of the opinion that the poll in the First Ward in Cincinnati should not be thrown out. To disfranchise 1,700 voters, who cast their ballots in good faith at a peaceable election where no fraud is shown, upon irregularities in the constitution of the board of election, is what this committee is not prepared to recommend.

If the House of Representatives has ever, moved by partisan bias, established a precedent opposed to this conclusion, the committee have no hesitation in saying that it declines to be governed by any such precedent. It has been shown that if such precedent can be found it is also true that the contrary principle has been more than once recognized and acted upon. Even if this were not so, it is never too late to do justice. That requires that the poll in the First Ward shall be sustained notwithstanding the irregularities attending it.

A question of less importance was considered as to another ward:

The counsel for the contestant, in his oral argument before the committee, did not raise any question as to the Thirteenth Ward in Cincinnati; but as objection is taken to its poll in the contestant's. notice and in the printed brief of his counsel, the committee have fully considered the points there raised.

It is claimed that more votes were put into the ballot box than there were names on the poll book. The testimony shows that there was such an excess of 9 votes; but so far from suggesting any fraud, all, or nearly all, of the witnesses account for it by the great rush upon the polls in the morning, at noon, and at evening, causing a rapidity of voting so great that the clerks could not take down all the names. The witnesses for both contestant and sitting Member testify to this.

It is also set forth in contestant's notice that the judges of the election in this ward prevented persons from voting for contestant by rude and threatening language and conduct, driving legal voters away from the polls, and otherwise intimidating them. The committee have carefully read all the testimony bearing upon this charge, and fail to find any such violence or force as impairs the integrity of the poll. At times there was loud talk about the ballot box, and the crowd would become excited to some extent in its movements, calling for some effort on the part of the officers to keep the way to the polls clear. Several witnesses testify that they believe that voters were kept from voting by the course pursued by the judges of election, but the number stated is very small, varying from three to five or eight, while policemen present, and other well-known citizens, state that there was no such intimidation.

The committee, in accordance with their conclusions, reported resolutions declaring contestant not elected and confirming the title of sitting Member to the seat.

On December 21, 1870,[1] the resolutions were agreed to in the House without debate or division.

879. The Kentucky election case of Barnes v. Adams in the Forty-first Congress.

The House declined to find persons disqualified as voters because they had formerly borne arms against the Government.

The State law providing, with affixed penalty, that both political parties should be represented in boards of election officers, the House declined to reject the returns for noncompliance with this law.

The House held a duly appointed election judge to be an officer de facto, although not possessing a required qualification as to former loyalty.

In the absence of fraud the failure of an election officer to be sworn does not destroy the effect of his acts as an officer de facto.

On May 23, 1870,[2] Mr. George W. McGrary, of Iowa, from the special Committee of Elections, submitted a report in the case of Barnes *v.* Adams, of Kentucky. The sitting Member had been returned by a majority of 462 over the contestant.

The committee found the settlement of the contest to depend on several questions of law:

(1) As to the right of ex-Confederate soldiers to vote in Kentucky, the committee found:

There is no law of the United States or of the State of Kentucky disfranchising the persons who were common soldiers in the rebel army. It is well known that these persons are legal voters under the laws of most of the States of the Union. They are clearly entitled to vote under the constitution and laws of Kentucky for members "of the most numerous branch of the State legislature," and are, therefore, entitled to vote for Members of Congress under the provisions of section 2, article 1, of the Constitution of the United States, which declares:

"The House of Representatives shall be composed of Members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature."

In the case of McKee *v.* Young, in the last Congress, the House rejected the votes of certain rebel soldiers, but it was done upon the ground that at the time of the election at which they voted they were in actual organized, armed hostility to the United States. Although the rebel soldiers who voted were

[1] Third session Forty-first Congress, Journal, p. 97; Globe, p. 274.

[2] Second session Forty-first Congress, House Report No. 74; 2 Bartlett, p. 760.

at home on parole, they were held to be actually in the rebel army, and it was insisted that to allow them to vote would be equivalent to saying that an army, organized for and engaged in an effort to destroy the Government of the United States, might vote for Members of Congress. The case now before us is, however, very different. When this election took place, more than three years had elapsed since the close of the rebellion, and the armed hostility to the Government had long since ceased. With the policy of disfranchisement those who took arms against the Government the committee has nothing to do. It is simply a question of law, concerning which we can entertain no doubt.

(2) The law of Kentucky provided as follows in regard to the appointment of election officers:

Be it enacted by the general assembly of the Commonwealth of Kentucky, That hereafter, so long as there are two distinct political parties in this Commonwealth, the sheriff, judges, and clerk of election, in all cases of elections by the people under the Constitution and laws of the United States and under the constitution and laws of Kentucky, shall be so selected and appointed as that one of the judges at each place of voting shall be of one political party, and the other judge of the other or opposing political party; and that a difference shall exist at such place of voting between the sheriff and clerk of election: *Provided,* That there be a sufficient number of the members of each political party resident in the several precincts, as aforesaid, to fill said offices. And this requirement shall be observed by all officers of this Commonwealth who have the power to appoint any of the aforesaid officers of election, under the penalty of a fine of one hundred dollars for each omission, to be recovered by presentment of the grand jury.

The committee thus discuss a failure to conform to this law:

We inquire, in the next place, what was the effect of a failure to divide election officers equally between the two political parties. We are altogether unable, consistently with our views of the law, to hold that such failure of itself avoids the election. What we have said, and what we shall hereafter say, about the validity of the official acts of officers de facto applies here, for such officers are clearly of that class. Besides, the statute which we have quoted, requiring an equal division of election officers between the two political parties, itself provides the penalty which shall be incurred by the persons appointing these officers, if the statute is disregarded. It declares that the penalty shall be a fine of $100 for each offense of the kind. It does not declare that the election shall be set aside in such cases. It will be seen hereafter that this point is not material to the case of contestant, inasmuch as by throwing out all the polls where the election officers were not equally divided politically he would lose more than he would gain.

(3) An act of 1862 qualified the above act by providing that—

SEC. 1. That in construing the act approved February 11, 1858, to which this is an amendment, those who have engaged in the rebellion for the overthrow of the Government, or who have in any way aided, counseled, or advised the separation of Kentucky from the Federal Union by force of arms, or adhered to those engaged in the effort to separate her from the Federal Union by force of arms, shall not be deemed one of the political parties in this Commonwealth within the provisions of the act to which this is an amendment.

The committee conclude that the above provision was intended to prevent the recognition of the secession party of 1862 in Kentucky, and operated upon that party as a class and not upon individuals. The secession party had ceased to exist and therefore the provision was inapplicable. In the debate on the floor this construction of the law was disputed.

The committee observe, however, that if the statute should be construed as applying to individuals rather than to a party, and should be construed as forbidding the appointment of such persons, nevertheless if they were "de facto offi-

cers, acting under color of authority, and not mere usurpers, then their acts are not (in the absence of fraud) void as to third parties." The committee say:

These judges of election, under the law of Kentucky, are appointed by the county courts in the several counties. They are to consist of two justices of the peace, if so many there be, or of one justice of the peace and one other suitable person. In case of a disagreement between the judges, the sheriff acts as umpire. It seems clear to the committee that even if the acts above named were construed as claimed by contestant, it could only follow that the county courts in Kentucky had failed in some instances to do their duty in selecting election officers, and had thus subjected themselves to the penalty provided by those statutes, to wit, "a fine of $100 for each omission," and not that all votes cast at the elections held by such officers should be thrown away. An officer appointed by competent authority, having all the other qualifications requisite, save only that of loyalty during the rebellion (where that is required), would certainly be an officer de facto, clothed with color of authority, at least.

On a question arising from the charge that certain election officers were not sworn, the doctrine of de facto officers is considered further:

There is, however, a principle of law which your committee believe to be well settled by judicial decisions, and most salutary in its operations, which is conclusive of this point, as well as of several other points in this case. It is this: That in order to give validity to the official acts of an officer of election so far as they affect third parties or the public, and in the absence of fraud, it is only necessary that such officer shall have color of authority. It is sufficient if he be an officer de facto and not a mere usurper. This doctrine has been recognized and enforced by many of the highest courts of this country.

The report cites the cases of The People *v.* Cook (N. Y., 4 Selden, 67), Taylor *v.* Taylor et al. (10 Minnesota, 107), Baird *v.* Bank (Penn., 11 S. and R., 414), Pritchett *v.* The People (Ill., 1 Gilm., 529), The People *v.* Ammons (5 Gilm., 107), St. Louis County Court *v.* Sparks (10 Mo., 121), etc.

The report further reviews the Congressional cases of Jackson *v.* Wayne, McFarland *v.* Culpepper, Easton *v.* Scott, Draper *v.* Johnston, Howard *v.* Cooper, Delano *v.* Morgan, Milliken *v.* Fuller, Clark *v.* Hall, Flanders *v.* Hahn, and Blair *v.* Barrett, and concludes:

The question, therefore, regarded in the light of precedent or authority alone, would stand about as follows: The judicial decisions are all to the effect that the acts of officers de facto, so far as they affect third parties or the public in the absence of fraud, are as valid as those of an officer de jure. The decisions of this House are to some extent conflicting; the point has seldom been presented upon its own merits, separated from questions of fraud; and in the few cases where this seems to have been the case the rulings are not harmonious. In one of the most recent and important cases (Blair *v.* Barrett), in which there was an exceedingly able report, the doctrine of the courts, as above stated, is recognized and indorsed. The question is therefore a settled question in the courts of the country, and is, so far as this House is concerned, to say the least, an open one.

Your committee feels constrained to adhere to the law as it exists and is administered in all the courts of the country, not only because of the very great authority by which it is supported, but for the further reason, as stated in the outset, that we believe the rule to be most wise and salutary. The officers of election are chosen of necessity from among all classes of the people; they are numbered in every State by thousands; they are often men unaccustomed to the formalities of legal proceedings. Omissions and mistakes in the discharge of their ministerial duties are almost inevitable. If this House shall establish the doctrine that an election is void because an officer thereof is not in all respects duly qualified, or because the same is not conducted strictly according to law, notwithstanding it may have been a fair and free election, the result will be very many contests, and, what is worse, injustice will be done in many cases. It will enable those who are so disposed to seize upon mere technicalities in order to defeat the will of the majority.

In the debate this position was assailed.

880. The election case of Barnes v. Adams, continued.

Contestee having objected when certain evidence was taken that it was not covered by the notice, the Elections Committee sustained the objection.

The returns from an election precinct not being certified in any manner whatever, they were rejected by the House.

Persons working on a railroad and intending to leave on its completion were held not to have such residence as to make them voters.

Where elections were viva voce the Elections Committee required contestant to prove the want of residence of such persons as he claimed voted illegally.

An entire poll should not be rejected when it is possible to purge it of illegal votes.

Threatening notices posted before an election and not resulting in deterring voters from going to the polls do not justify rejection of the polls.

(4) A further point was thus considered:

The act of Congress regulating proceedings in cases of contested elections, and under which this proceeding was instituted, provides as follows:

"Whenever any person shall intend to contest the election of any Member of the House of Representatives of the United States, he shall, within thirty days after the result of said election shall have been determined by the officers or board of canvassers, give notice in writing, to the Member whose seat he designs to contest, of his intention to contest the same, and such notice shall specify particularly the grounds upon which he relies in the contest." (See Brightley's Digest, vol. 1, p. 254, sec. 14.)

As in this case there is nothing in the notice of contest in relation to the failure of election officers to take the oath prescribed by law, contestee objects to all the evidence upon that subject, and did so object, as the record shows, when the same was taken. The committee are of the opinion that the objection is well taken. The language of the statute is specific and admits of but one construction. The grounds of the contest which are to be insisted upon must be stated in the notice. This, of course, is to the end that the contestee may be fully advised of the nature of the case which he has to meet. The notice is the only pleading required of contestant; it is the foundation upon which the whole proceeding rests, and if the contestant could introduce one new cause of contest not mentioned therein he could introduce any number, and the contestee could never know in advance of the taking of the testimony what issues are to be tried. When we add to this the consideration that the time for taking testimony in these cases is, as compared with ordinary litigation of equal importance in the courts of the country, necessarily brief, and that if a contestant may go outside of his notice at all he may do so just before the time for taking testimony expires and thus cut off his adversary from the privilege of taking rebutting testimony, the great importance of adhering to the law will be apparent to all.

(5) Certain returns were thrown out because of the omission of necessary formalities:

We have already said that the Glades precinct, No. 11, in Pulaski County, must be rejected, because it is not certified to be correct by any officer. This objection is substantial and not technical. The paper purporting to be a poll book for this precinct proves nothing whatever. To admit such a, paper as evidence would be to set aside all rules and open wide the door for fraud.

In four other precincts the returns are rejected because "the poll books are not certified in any manner whatever."

(6) As to the qualifications of certain voters:

No person is a legal voter under the constitution of Kentucky unless he be a resident of the State, county, and voting precinct. A temporary sojourner is not a resident within the legal sense of that term. A person who goes to a place for a specified purpose, and with the intention of leaving it when that purpose is accomplished, does not gain a residence, however long he may remain. It follows that such persons as went into any of the precincts in question for the purpose of working on the railroad, and with the intention of leaving when the road should be completed, had no right to vote. The testimony is not as dear as it might be as to the number of votes which ought to be thrown out under this ruling. The committee are of the opinion that the following rule should govern in determining what votes to reject: Whenever it appears that a person came into the precinct for the purpose of working on the railroad, that he resided in a temporary habitation, and was generally regarded as a temporary inhabitant, and that he actually left very soon after the road was completed, and soon after the election, his vote should be rejected.

(7) It being charged generally that in a certain precinct certain disqualified railroad hands voted, the report says:

That there were illegal votes cast by some of these persons we think is beyond question, but the presumption is always in favor of the legality of a vote which has been admitted by the proper officers; and since all elections in Kentucky are viva voce, and since the record shows how each person votes, it would not, we think, be too much to require contestant to prove the want of residence of such persons as he claims illegally voted for contestee.

As to another precinct where a similar charge was made:

The vote at this precinct should undoubtedly be purged of a number of illegal votes, but the evidence is not sufficient to authorize the rejection of the entire poll, especially in view of the fact that it was within the power of contestant to show the facts in relation to each person who voted for contestee, and thus purge the poll of all illegal votes. The rule is well settled that the whole vote of a precinct should not be thrown out on account of illegal votes having been cast, if it be practicable to ascertain the number of illegal votes, and the person for whom cast, in order to reject them and leave the legal votes to be counted. Legal votes are not to be thrown out in order to get rid of illegal votes, unless necessity requires it as the only means of preventing the consummation of a fraud upon the ballot box.

(8) In one precinct intimidation was alleged. It was proven that preceding the election threatening notices promising that certain Republicans should be lynched had been posted, and several persons had been lynched and one or two murdered in the vicinity a short time previously. But the only result of this seemed to be that both parties appeared at the polls armed. There was no violence at the polls, and a full vote was given, no one being prevented from voting as he chose. The report says:

It is not to be doubted that an effort was made to intimidate the Republican voters at this precinct by posting up threatening notices and otherwise; but it is also clear that it was wholly unsuccessful. The Republicans went to the polls determined to maintain their rights, and they were not molested. The vote of this precinct can not be rejected.

In accordance with the principles set forth above the committee found the majority of sitting Member to be 332, and reported a resolution confirming his title to the seat.

On July 5 [1] the report was debated at length. A motion to recommit the report with instructions that the case be reexamined was disagreed to—yeas 21, nays 121.

The resolution of the committee was then agreed to without division.

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[1] Journal, pp. 1147, 1148; Globe, pp. 5179–5193.

881. The Indiana election case of Reid v. Julian in the Forty-first Congress.

Discussion of the reasons justifying the rejection of an entire poll.

Election officers not being residents of the precinct as required by law, the poll was rejected.

A person not possessing the qualifications required for an officer de jure may not be an officer de facto.

Discussion as to the principles on which a fraudulent return is rejected.

On July 6, 1870,[1] Mr. John Cessna, of Pennsylvania, from the special Committee on Elections, submitted the report in the Indiana case of Reid *v.* Julian. The minority views, presented by Mr. Samuel J. Randall, of Pennsylvania, gives the most succinct statement of the real issue in the case. The official ascertainment of the result in the district had given to Mr. Julian, the sitting Member, a majority of 116. The minority views thus explain:

> This result was reached, as the evidence shows and as is admitted by the contestee and contestant, in consequence of the clerk of Wayne County, in reporting the aggregate vote of that county, leaving out of his report the aggregate vote of the south precinct of Richmond City, a poll or precinct of Wayne County, at which Mr. Reid obtained 676 votes and Mr. Julian received 475 votes, as returned by the judges of election; thus giving Mr. Reid a majority of 201 votes over Mr. Julian at said poll or precinct; but which was rejected by the board of canvassers of Wayne County, Ind., and which was not counted by the county clerk in his return to the secretary of state, and consequently was not included by the latter in his aggregate of votes as certified to the governor. If this poll and vote had not been rejected by the board of canvassers of Wayne County, then Mr. Reid would have received a majority of 85 votes on the total vote over Mr. Julian and, as a matter of right, would have been entitled to the certificate of the governor.

This not being a prima facie case the committee did not review the action of the board of canvassers, but passed at once to consider the case on its merits and to consider the justice of sitting Member's claim that the entire poll in the precinct in question should be rejected.

The majority say:

> It has long been held by all the judicial tribunals of the country, as well as by the decisions of Congress and the legislatures of the several States, that an entire poll should always be rejected for any one of the three following reasons:
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> 1. Want of authority in the election board.
> 2. Fraud in conducting the election.
> 3. Such irregularities or misconduct as render the result uncertain.
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> We are clearly of opinion that the first and third reasons were sufficiently shown in this case.
>
> If the second reason has not been established against the officers conducting the election, it has been abundantly shown that these officers afforded the opportunity for someone else to commit the fraud, if they did not do so themselves.
>
> This House has, in very many cases, rejected the entire polls for the several reasons before stated or for either one of them. These decisions commenced many years ago, and have continued regularly until the present time. Jackson *v.* Wayne, 1792 (Contested Elections, vol. 1, p. 47); McFarland *v.* Purviance, 1804 (same vol., p. 131); Easton *v.* Scott, 1816 (same vol., p. 272); McFarland *v.* Culpepper, 1807; Draper *v.* Johnson, 1832 (same vol., p. 710); Howard *v.* Cooper (2 vol. Contested Elections);

[1] Second session Forty-first Congress, House Report No. 116; 2 Bartlett, p. 822; Rowell's Digest p. 253.

Blair *v.* Barrett (2 vol. Contested Elections, p. 308); Knox *v.* Blain (2 vol. Contested Elections, p. 521); and other cases therein cited.

Both volumes of contested election cases in Congress are full of such precedents. Delano *v.* Morgan, Myers *v.* Moffat, Covode *v.* Foster, and numerous other cases not yet reported, are to the same effect.

The majority also quote at length the decision of the court in the Pennsylvania contested elections of 1867. (1 Brewster, 171.)

As to the want of authority in the election board, the law is quoted with its requirement that the judges selected should be "two qualified voters of the precinct." Then as to the southern precinct of Richmond the majority say:

On the morning of the election in October, 1868, S. W. Lynde appeared at the poll of the southern precinct and claimed to act as inspector of elections. After some slight controversy, M. M. Lacey and John S. Lyle were declared elected as judges. Mr. Lynde claimed to act as inspector, because he was one of the board of registry for the township of Wayne. He acted as a sort of president of the meeting at the organization of the board, and put to vote the motions made. Mr. Lynde swears (pp. 8 and 9) that he was not a resident in, nor a citizen of, the southern precinct; that he was a citizen of the northern precinct, and that he did on that day vote at the poll in said northern precinct.

Mr. Lacey testifies to precisely the same thing in regard to himself (p. 14), and Mr. Lyle does the same (pp. 9, 10, and 11). Several other witnesses bear similar testimony in regard to the residence of these three officers of the election board of the southern precinct. It is not denied by anyone, nor in any place, that the three officers of this board were nonresidents in the precinct where they held the election, and all of them voted on that day at a different poll.

The majority continue:

Elections should not be set aside for want of mere form, for innocent or unintentional irregularities. On the other hand, all the mandatory provisions of the law must be observed, or the election can not and should not be sustained. These questions have often been considered by the courts of the country, by this House, and by the legislatures of the several States of the Union.

On behalf of the contestant, however, it is urged that these persons were officers de facto, although it is conceded that they were not officers de jure. A large number of authorities have been cited to this point. It is freely admitted that the distinction between officers de facto and de jure is not well defined. The decisions of the House, and even the decisions of courts, on this question are somewhat inconsistent and conflicting. While we admitted that party spirit and surrounding circumstances have produced such apparent inconsistency in the decisions of the House, yet we venture to assert that in no case has it ever been held that persons were officers de facto who did not possess the qualifications requisite for officers de jure.

In the case of Delano *v.* Morgan even the minority of the committee (Democratic) reported in favor of excluding the entire poll of Blue Rock Township, and gave as a reason for so doing that the polls had been closed by the officers for about one hour so as to enable them to take dinner. To sustain this decision they quote the opinion of Judge Brinkerhoff, of Ohio, and yet in that case there was no pretense that the ballot box was tampered with, but that the judges rather acted in ignorance of what their duties were. This case (Delano *v.* Morgan) is directly in point in regard to the distinction we have attempted to make as to officers de facto. One of the officers of the Pike Township election was disqualified; the poll was rejected. The debates on this case are full to the point, and the conclusion is full and complete in favor of the distinction we make. One may be an officer de facto who has been irregularly or improperly appointed or selected, and his acts may be binding on third persons; but in a case of personal disqualification of the officer for reasons which could not be cured by a change in the manner of his selection, the rule is universal that he can have no jurisdiction, and all his acts are void from the beginning for want of authority.

This view as to an ineligible person claiming to be an officer de facto was held of importance in the debate, and was indorsed by Mr. Luke P. Poland, of Vermont,[1] who had given much attention to election cases.

[1] Globe, p. 653.

The minority antagonized this theory:

The evidence shows that those officers acted with permission of all the voters present at the opening of the poll, had their sanction and approval as such, and, as far as is known or the testimony discloses, without a single objection during the day of the election from anyone. I hold, therefore, although they may not have been officers de jure, they were officers de facto, and as such their acts were valid so far as they concern the public and protect the rights of third persons, although they may have had no legal right to exercise the duties of such election officers, and should stand. They clearly should stand in the absence of fraud.

As to the second and third questions, that of frauds and irregularities, the majority report says:

We are aware of the fact that it is often argued in defense of irregularities, bad faith, and even fraud in conducting elections, that it is hard to disfranchise the honest voter by reason of the mistakes or misconduct of election officers. This view has been so completely answered by the judges, in the opinions already cited, that little more need be said on this point. It might be well, however, to add that no legal voter is disfranchised by throwing out a fraudulent poll. The only effect of such action by the proper tribunal is to destroy the prima facie character of the return, and to deny to the official acts of such officers the legal presumption of correctness usually accorded to the conduct of faithful agents

882. The case of Reid v. Julian, continued.

Votes proven aliunde by persons swearing that they were qualified, and that they voted for the contestee in the election in question.

Votes may be proven aliunde by evidence of third persons as to how the voters cast their ballots.

Where votes are proven aliunde, the voter, in swearing to his vote, need not identify the ballot.

When votes are proven aliunde by one party to a contest, the residue are not allowed to the other party.

As to the specific acts, the majority enumerate a series which are explained or disputed by the minority.

A question arose in regard to the proceedings of sitting Member to purge the poll by evidence aliunde. The South Richmond returns gave Mr. Julian 475 votes and Mr. Reid 676 votes. As to the evidence aliunde, the majority say:

We find that Mr. Julian has called 508 persons who swear that they were voters in that precinct; that they voted in October, 1868, at that poll, and that they voted for said Julian. In the judgment of the committee, the evidence of these witnesses is as full, complete, and reliable as it is possible for human testimony to be given. It would be received in any court of justice in the country, and held sufficient to establish any fact in a civil, or even criminal, case. These names are appended to this report and contained in statement marked "Paper A." In addition to these he has called 22 other persons who give similar testimony in regard to themselves, and corroborate these by calling 22 witnesses who gave them tickets and saw them vote. For this list see Paper B, hereto attached. He has also produced a list of other persons voting at said poll, being 21 in number, whom he also claims as having voted for him. Eight of these were examined personally and 13 witnesses examined as to the others. While the evidence in regard to this list is not so entirely conclusive and unanswerable as in regard to the other two lists, yet it is altogether satisfactory and sufficient to establish a fact before any legal tribunal. For this list see Paper C.

Mr. Julian claims to have proved that he is entitled to 29 other votes cast at this poll. See Paper D, hereto attached. The evidence in regard to these 29 persons is such as to render it highly probable that they did vote for Mr. Julian, yet, as we think, insufficient to establish the fact as a legal conclusion. The weight of evidence and probabilities, however, are so largely in favor of this theory as to add greatly to the uncertainty of the return of this poll.

In this precinct the returns gave to Mr. Julian 475 votes and to Mr. Reid 676. Had this vote been counted by the county board Mr. Reid would have had a majority of 85 votes in the district, making 90 with the credit of 5 votes hereinbefore allowed him.

Mr. Reid makes several objections to Mr. Julian's attempt to purge this poll. He says that in several cases of the 551 persons claimed by Mr. Julian it is not shown by the witnesses that such persons were legal voters. In point of fact this is true of some 30 or 40 names. In the judgment of the committee no such proof was necessary in this case. The poll is either valid or void as a return of election. If void no effort to purge it is necessary. If the officers who held this election had authority, and if they could conduct it, then every vote which went into the box is presumed to have been given by a person duly qualified. The legal presumption in favor of the right of the voter is all that can be required.

The minority say:

The contestee, not contending that any direct fraud has been proven by him against anyone, asserts that, as one of the badges of fraud, he has proven by the oral testimony of over 500 witnesses that this number of ballots were actually voted for him, and that by the evidence of some 40 more persons they either voted for him or intended to do so; and hence the ballots in the ballot box must have been changed by some other person or persons, as there were only 475 votes returned for him by the judges, instead of over 500 votes, as should have been; but against the oral testimony of these witnesses there is the evidence of the analyzation of the actual tickets voted, and a complete recount of their number, made in the presence of the contestee's counsel, sworn to by the inspector of the south Poll as being true, and the tickets voted and counted at the election; and this testimony is confirmed by the township trustee and others, who had charge of the tickets from the close of the election until they were counted by the contestant, which analyzation shows 670 votes for the contestant instead of 676, and 479 votes for the contestee instead of 475 votes, with 32 ballots scratched or which had no name on them, 31 of which appeared to be Republican tickets and 1 a Democratic, making in all 1,181 tickets instead of 1,183, the number returned by the judges, and also that which the poll book shows.

The contestant had objected to the evidence by which the votes were proven aliunde, citing the case of Wheat *v.* Ragsdale (27 Ind., 203) to show that the witness should first be asked if he could identify his ticket, and then a search should be made for it. The majority say:

It does not appear that the tickets were before the notary swearing the witnesses, or before the witnesses being sworn. We therefore agree with the court in saying that the question supposed to be indispensable would have been of little practical importance. There were 1,151 tickets in this box for Congress, and it would be almost absurd to suppose voters could identify their tickets from such a number after a lapse of several months.

It was claimed in the debate[1] that in the absence of positive fraud, which vitiated and corrupted the whole poll, the contestant should be credited with the residue of votes after the allowance to sitting Member for what he had proven. But the majority did not allow this contention.

The majority of the committee found as a result of minor corrections and the purging of the South Richmond poll a majority of 602 for Mr. Julian, and reported resolutions declaring contestant not elected and that sitting Member was entitled to the seat.

On July 15[2] the report was debated in the House, and on that day a substitute of the minority declaring contestant elected was decided in the negative without division. Then the resolution declaring sitting Member entitled to the seat was agreed to, yeas 127, nays 50.

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[1] By Mr. Michael C. Kerr, of Indiana, Globe, p. 5651.

[2] Journal, pp. 1283–1285; Globe, pp. 5645–5653.

883. The Missouri election case of Shields v. Van Horn, in the Forty-first Congress.

Where a canvassing officer had without doubt wrongfully rejected a decisive return, it was held that the burden of proof should be on the wrongfully returned member.

Where the registration on which the vote depended was fraudulent, the House rejected the entire return.

On July 15,1870,[1] John C. Churchill, of New York, from the Committee on Elections, submitted the report of the majority in the case of Shields *v.* Van Horn, of Missouri. The report, after stating the vote of the district, says:

That this is a correct statement of the vote cast at that election is not questioned by either party, and it shows a majority for the contestant over the sitting Member of 983 votes. The secretary of state, to whom, by the law of Missouri, the returns of votes cast for the several candidates for Representative in Congress in each county are made by the clerk of the county court in each county, rejected the returns from the counties of Platte and Jackson, whereby a majority of 867 votes in the eight remaining counties was shown in favor of Robert T. Van Horn, to whom he give a certificate of election in due form, upon which he was admitted to the seat. The supreme court of Missouri, in two cases arising in different parts of the State at this election of 1868, have decided, in accordance with the general current of authority in this country, both legislative and judicial, that the action of the secretary of state was not authorized by law; that his sole duty was to add together the votes returned to him as cast for each candidate in the several counties, and to give the certificate to the person to whom, upon such addition, it appeared that a majority of votes had been given. (The People *v.* Rodman, 43 Mo., 256; The People *v.* Steers, 44 Mo., 224,228.)

The action of the secretary of state, therefore, does not aid us in deciding this contest upon the merits of the case, and is only referred to to explain the attitude of the different parties to this contest.

The minority[2] of the committee contend:

It being in proof, and in point of fact not denied by the contestee, that Shields received a majority of votes cast at the election and duly certified to the secretary of state, the commission, of right and in law, belongs to him. In contemplation of law and by virtue of the vote cast Shields is in Congress and Van Horn out, thus reversing the legal status of the parties to this contest, and changing the burden of proof from the contestant Shields to the contestee Van Horn. The consequences of this position of parties are important and bear on the whole question of testimony, its application to and value in the case. The contestee says, "Congress possesses original and exclusive jurisdiction in extending the right of parties to seats in Congress." Without questioning this rule, it maybe remarked that it is in entire harmony with the foregoing suggestions as to the status of the parties; and that it is plainly at war with the usurpations of the secretary of state as a canvassing officer, in assuming a jurisdiction belonging "exclusively" to Congress. With just as much support in law might the secretary assume all the powers of Congress, and pass upon the qualifications of Members, as to assume to judge of their election and returns.

The legal consequence therefore is that in order rightfully to hold the seat he now occupies in the House by usurpation of the secretary of state, and which seat prima facie belongs to the contestant, the burden of proof is upon the sitting Member to show that a majority of the qualified votes cast at the election in the whole district, Platte and Jackson included, were cast for him, and not, as returned by the several clerks, for Shields, the contestant.

The committee found that the returned vote of Platte County should stand, since the sitting Member, although he had attacked it in his answer to the notice of contest, had presented no e-evidence to sustain the allegations of his answer.

[1] Second session Forty-first Congress, House Report No. 122; 2 Bartlett, p. 922.

[2] Views presented by Mr. Albert G. Burr, of Illinois.

Therefore the only question left was as to the vote of Jackson County. This vote the sitting Member had attacked, and taken evidence to sustain the attack.

The basic facts in this case were substantially the same as in the case of Switzler *v.* Dyer, already decided at this session,[1] the oath of loyalty being required before registration, and it being charged that this requirement had been rendered inoperative by the corrupt acts of a superintendent of registration named Phelan, in the county of Jackson. The majority regarded this charge as proven, and say:

> The officers of election also have no discretion in the receiving or rejecting of votes. They are governed by the registration, and it is made a penal offense for them to receive the vote of any person not registered or to reject the vote of any person registered. It is of the first consequence, therefore, that the registration be honest and pure, for without that the purity of the election can not be maintained. and if the registration be rejected the whole election falls. We think that the evidence in this case establishes: That the removal of the first board appointed by Phelan, and the appointment of their successors, who made the registration, was the result of a corrupt agreement to that effect, made by Phelan with Charles Dougherty and others, and was made in the interest of one of the political parties in the county of Jackson (pp. 20, 21); also that the registrars appointed were parties to that corrupt agreement, or cognizant of it; and, further, that the registration was conducted contrary to law and with the purpose of carrying that corrupt agreement into effect.
>
> In the case of Switzler *v.* Dyer, decided by this Congress, the majority of the committee did not believe the fraudulent agreement in that case charged to have been established by the evidence, made, and therefore reported in favor of the contestant. The House, however, reversed the finding of the committee in this report; rejected the vote of Monroe County, which was in question, and gave the seat to the contestee. In this case the majority of the committee find the corrupt agreement established by the evidence, and upon the authority of the case just quoted, as of many other cases, reject the registration of Jackson County as fradulent, and with it reject the vote of that county, which was the result of that fradulent registration.
>
> This conclusion makes it unnecessary for the committee to consider the irregularities shown to have occurred at the election, where persons not on the list of registered voters were allowed to vote upon the certificate of a single member of the board of registration (pp. 35, 36, 42), nor the defects in the poll books returned by the judges of election to the clerk of the county court (pp. 42, 43, 53). The rejection of the vote of Jackson County makes the vote of Robert T. Van Horn 5,964 and of James Shields 5,352 and elects the former by a majority of 612. The committee therefore recommend the adoption of the following resolutions:
>
> *"Resolved,* That James Shields is not entitled to a seat in the House of Representatives in the Forty-first Congress from the Sixth Congressional district of Missouri.
>
> *"Resolved,* That Robert T. Van Horn is entitled to a seat in the House of Representatives in the Forty-first Congress from the Sixth Congressional district of Missouri."

The resolutions were considered in the House on February 21, 1871,[2] and were agreed to without debate or division.

884. The Tennessee election case of Sheafe v. Tillman, in the Forty-first Congress.

A decision as to what constitutes the determination of result within thirty days of which the notice of contest is to issue.

The action of a State executive in throwing out votes was disregarded by the House.

The governor of a State, as canvassing officer, is not justified in rejecting votes duly cast and returned.

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[1] See section 873 of this volume.

[2] Third Session, Forty-first Congress, Journal, p. 388; Globe, p. 1474.

An election officer appointed without authority of law was held not to be an officer de facto.

There being evidence of both fraud and intimidation, the failure of election officers to be sworn vitiated the returns.

On January 10, 1871,[1] Mr. G. M. Brooks, of Massachusetts, from the Committee of Elections, presented the report of the majority in the Tennessee case of Sheafe *v.* Tillman. At the outset a preliminary question was settled, the minority concurring in the view set forth by the majority:

Before proceeding to a consideration of the merits of this case, a question, preliminary in its nature, first should be disposed of. The contestee in his answer claims that contestant did not serve notice of his intention to contest his seat within the time required by statute, and his specification is as follows:

"First. Because contestant did not file his notice or deliver a copy of the same in time. Respondent's certificate is dated and was issued on the 31st of December, 1868; and contestant's notice, or a copy of it, was not served on or delivered to respondent until the 19th of February, 1869, more than thirty days after the date and issuance of the certificate to respondent."

The United States statute of February 19, 1851, provides that—

"Whenever any person shall intend to contest an election he shall, within thirty days after the result of such election shall have been determined by the officer or board of canvassers authorized by law to determine the same, give notice in writing to the member whose seat he designs to contest, etc." (9 Stat. L., 568.)

To decide the question raised, it becomes necessary to ascertain at what time the result of the election in the Fourth Congressional district was determined by the officers "authorized by law to determine the same."

Section 880 of the Code of Tennessee, page 232, provides that—

"The governor and secretary of state shall, as soon as the returns are received, in the presence of such electors as choose to attend, compare the vote in these several cases (among others for Members of Congress) and declare the person receiving the highest number of votes duly elected."

From this provision it would seem that it was the intention of the law that the governor and the secretary of state should personally meet and, in the presence of such electors as choose to attend, make a comparison of the votes. From the evidence introduced, it does not appear that this requirement of the statute was ever complied with by a comparison of the votes by the governor and the secretary of state being personally present together and performing this duty. The secretary of state in October, 1869, testified that he had not seen the governor for nearly two years; that this provision of the code had been treated as only directory by the State officers, and was understood only to require a comparison of the duplicates which ought to be in each office, and that even this had never been done by the governor and secretary of state together to his knowledge. Without deciding the question whether the above officers should personally compare the returns, unquestionably the governor and the secretary of state, by the Code of Tennessee, constitute the officers referred to in the United States statute of February 19, 1851, above cited, and until they have made a comparison of the votes, and definitely and finally acted upon the matter, the result of the election can not be determined in such manner as to bring a contestant within the provisions of the United States statute last above cited.

The committee found that the governor by proclamation of February 11, 1869, had stated that he awarded the certificate to Mr. Tillman, The report says:

The committee are of the opinion that if the provisions of section 880 of the Code ever had been complied with, according to the construction given to the section by the secretary of state, yet there had been no such determination of result of the election as required by the United States statute of February 19, 1851, until after the issuance of the commission to the contestee after February 11, 1869, and therefore the notice, being given on February 15, 1869, was within the time required by statute.

On the count of votes returned the contestant, Mr. Sheafe, had a majority of 1,156 votes; but the governor had assumed to reject the returns of one entire

[1] Third Session, Forty-first Congress, House Report No. 3; 2 Bartlett, p. 907.

county and parts of another county, thereby causing a plurality of 432 votes to result for Mr. Tillman. The committee was unanimous as to the following conclusion:

There is no law of the State of Tennessee that gives authority to the governor to reject the vote of any county or part of a county; his duty is only to compare the returns received by him with those returned to the office of the secretary of state, and, upon such comparison being made, to "deliver to the candidate receiving the highest number of votes in his district the certificate of his election as Representative to Congress." (Code of Tennessee, sec. 935, p. 239.) If illegal votes have been cast, if irregularities have existed in the elections in any of the counties or precincts, if intimidation or violence has been used to deter legal or peaceable citizens from exercising their rights as voters, to this House must the party deeming himself aggrieved look for redress. This great power of determining the question of the right of a person to a seat in Congress is not vested in the executive of any State, but belongs solely to the House of Representatives. (Constitution United States, Art. I, sec. 5.)

The action of the governor, so far as he has thrown out the votes of counties or parts of counties, is to be disregarded, and the matters in dispute are to be settled upon the actual returns and the evidence introduced, independent of the doings of the executive.

In determining the actual result of the election the committee consider, first, the county of Lincoln, which returned for Tillman 5 votes, and for Sheafe 554. The statutes of the State provided that the governor should appoint a commissioner of registration for each county of the State, and also that—

he is hereby fully empowered to set aside the registration of any county in this State, or any part thereof of said registration, when it shall be made to appear to the satisfaction of the governor that frauds and irregularities have intervened in the registration of voters in such county. The governor shall make known such fact, and set aside said part or whole of said registration, when frauds are shown to have been committed, by proclamation.

Some time prior to the November election in 1868 the governor by proclamation did "set aside and declare null and void all that part of the registration of our county of Lincoln made by A. H. Russell, late registration commissioner."

The governor not making any other appointment, it was generally assumed in the county that no legal election could be held, since the statute provided that the commissioner of registration should appoint "the judges and clerks of all elections," and "hold all elections." But on the day preceding the election the county court of Lincoln County appointed one C. S. Wilson to open and hold the election in the county, and the said Wilson did in fact hold elections in seven of the twenty-five districts in the county, and made returns thereof, signed by himself as coroner. The report concludes as to this act of Wilson:

It is not necessary to discuss the question of the constitutional powers of the governor to set aside a registration, for if this act of his was unconstitutional, and he had no power to set aside a registration and remove a commissioner, then there was no vacancy; the commissioner had not been deprived of his office, and he was the only person by law authorized to hold the election. But if this act of the governor did have the effect of removing the commissioner, the county court had no right under the statute to appoint an election officer; the act of February 26, 1867, chapter 26, section 2, above referred to, vested the appointing power of these officers wholly in the executive, and repealed all laws in conflict therewith. Wilson, therefore, held his office under no color of legal authority; was not even an officer de facto, but was a mere usurper, and all acts done by him as such officer were illegal and void; and when it appears that Wilson was appointed by the court only the day prior to the election, so that it would have been impossible that due notice of his appointment or of the election could have been given; that elections were held in only seven of the twenty-five districts of the county; that it was generally understood that there was no officer legally appointed to hold the elections, and that voters did not attend the polls on that account; and when it further found that there existed in the county organizations of men

mounted, armed, and disguised, and known by the name of the Ku-Klux Klan, banded together for political purposes, who, by their threats and violence, intimidated and deterred voters from attending the polls, there could not have been and was not such a full and free expression of the will of the voters as is deemed necessary to constitute a fair election. The committee, therefore, is of the opinion that this election had no semblance of legality, and that the entire vote of Lincoln County should be rejected.

The minority [1] claimed that the action of the governor was void as to the registration, and that the coroner was the proper officer to hold the election under the old law, the repeal of which was not admitted. The intimidation alleged by the majority was also denied.

The majority of the committee further find that in Marshall County previous to the election there was intimidation by the Ku-Klux so that there was not a free expression of public sentiment at the polls. For this reason, and for the reasons set forth below, they recommended the rejection of the poll. The report says:

The commissioner of registration of this county in his return states that in the districts numbered 1, 4, 7, 13, and 15, which gave Tillman 9 and Sheafe 559 votes, "no oath accompanied the poll box, but all certified to be held according to law." And the evidence introduced does not disclose that the oath required by statute was taken and subscribed in the above districts in conformity to law.

The committee adheres to the principle enunciated in the contested election cases of Barnes *v.* Adams, second session of this Congress, viz, that it is not essential to the validity of an election that the officers should be sworn, or should in all things be held to the strict requirements of the law, so far as their qualifications for the office which they hold are concerned. If it appears that there was no fraud in the election, that it had been fairly conducted, and that there was an opportunity for a full expression of the will of the voters at the ballot box, the mere fact of the omission of an officer to take the oath prescribed by law will not vitiate an election. But if, on the other hand, the election was not fairly conducted, if there was fraud in the ballot, if it should appear that there was an organized attempt of a class of persons in the county to prevent citizens of one particular political belief from depositing their votes freely and peaceably, if intimidation was used to control the voters, and by these means there was not a full, fair, and free expression of the will of the voters at the ballot box, then, in such voting precincts where the requirements of law were not complied with, the vote should be rejected.

The report also approves the rejection of the returns of the first district of Franklin because of intimidation exercised before the election, and also because neither judges nor clerks were sworn according to law. The report says:

In the first district, in which Tillman received 3 and Sheafe 293 votes, the poll book was among the papers in evidence; no oath accompanied the same, and no statement or certificate appeared that any of the officers were sworn; testimony was introduced showing that all the officers were sworn except the one who held the election. It also appeared in evidence that some persons voted without proper certificates, and that the frauds perpetrated at the election were so flagrant that the crowd about the ballot box regarded it as a huge joke and seemed to enjoy it as such. It also appeared that the Ku-Klux visited this district at times during the spring and summer of 1868, in various numbers.

The majority of the committee recommended resolutions declaring contestant not elected, and sitting Member entitled to the seat.

On February 14, 1871,[2] the resolutions were taken up in the House and were at once agreed to without debate or division. But it appeared that there was some understanding, and on a motion to reconsider, the report was debated at length. Then, on a motion to lay on the table the motion to reconsider, there was a division, the motion being tabled—yeas 123, nays 60. So the report of the majority of the committee was sustained.

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[1] Views filed by Mr. P. M. Dox, of Alabama.

[2] Journal, p. 338; Globe, pp. 1219–1229.

885. The Pennsylvania election case of Cessna v. Meyers, in the Forty-second Congress.

When a voter's qualifications are objected to the burden of proof is on the objecting party to show that the person voted for the competitor and was disqualified.

Evidence of hearsay declarations of the voter is receivable only when the fact that he voted is shown by evidence aliunde.

Declarations of the voter as to his vote must be clear and satisfactory and clearly proven.

Discussion of the value as evidence of a party's declaration as to his vote, whether a part of the res gestae or not.

Discussion of the English and American rules of evidence as applied to the declarations of the voter.

Discussion of the status of the voter as a party to the proceedings in a contested election case.

As to the application of technical rules of evidence in an election case, which is a public inquiry.

On February 7, 1872,[1] Mr. George F. Hoar, of Massachusetts, from the Committee on Elections submitted the report in the Pennsylvania case of Cessna *v.* Meyers. The sitting Member was returned by an official majority of 15 votes. Contestant charged that a large number of illegal votes were cast and counted for sitting Member, and sitting Member also charged that illegal votes were similarly cast and counted for contestant.

The committee passed upon two questions as to evidence:

(*a*) The State constitution prescribed the qualifications of voters, and as to evidence the report says:

> Under these constitutional provisions, the burden of proof, when either party insists that a vote should be deducted from those cast and returned for his competitor, is upon that party to show that the person whose vote is in question voted; that the vote was for the competitor; that the voter lacked some one of the following qualifications.

(*b*) As to the effect and sufficiency of certain testimony of voters, the report says:

> Another question of importance which has arisen in the discussion of the cause is the question whether evidence of the declarations of alleged voters, made not under oath, in the country, should be received to show the fact that they voted, or for whom, or that they were not legally entitled to vote.
>
> Some of the committee think that such evidence ought in no case to be admitted, except, of course, so far as declarations made at the time of the party's intent or understanding as to his then present residence, or his purpose in a removal, is admissible as part of the res gestae. All of the committee are of opinion that such evidence is to be received with the greatest caution, to be resorted to only when no better is to be had, and only acted on when the declarations are clearly proved, and are themselves clear and satisfactory. As this question has been quite fully considered, it may be proper briefly to discuss it here.
>
> While the practice of the English House of Commons is not uniform, the general current of the precedents is in favor of admitting the declaration of voters as evidence.
>
> The opinions of several American courts and of some text writers of approved authority are the same way. The correctness of this practice has been earnestly questioned in this House, and there is one deci-

[1] Second session Forty-second Congress, House Report No. 11; Smith's, p. 60; Rowell's Digest, p. 266.

sion against it; but, on the whole, the practice here seems to be in favor of its admission. In England, where the vote for members of Parliament is viva voce, the fact that the alleged voter voted, and for whom, is susceptible commonly of easy proof by the record. In one case, however, where the poll list had been lost, the parol declaration of a voter how he voted seems to have been received without question. In State *v.* Olin (23 Wis., 319) it is stated that the declaration of a voter is admissible to prove that he voted, and for whom, as well as to prove his disqualification. The general doctrine is usually put upon the ground that the voter is a party to the proceeding, and his declarations against the validity of his vote are to be admitted against him as such. If this were true, it would be quite clear that his declarations ought not to be received until he is first shown, aliunde, not only to have voted, but to have voted for the party against whom he is called. Otherwise it would be in the power of an illegal voter to neutralize wrongfully 2 of the votes cast for a political opponent—first, by voting for his own candidate; second, by asserting to some witness afterwards that he voted the other way, and so having his vote deducted from the party against whom it was cast.

But it is not true that a voter is a party in any such sense as that his declarations are admissible on that ground. He is not a party to the record. His interest is not legal or personal. It is frequently of the slightest possible nature. If he were a party, then his admissions should be competent as to the whole case—as to the votes of others, the conduct of the election officers, etc., which it is well settled they are not. Another reason given is that the inquiry is of a public nature and that it should not be limited to the technical rules of evidence established for private causes. This is doubtless true. It is an inquiry of a public nature and an inquiry of the highest interest and consequence to the public. Some rules of evidence applicable to such an inquiry must be established. It is nowhere, so far as we know, claimed that in any other particular the ordinary rules of evidence should be relaxed in the determination of election cases. The sitting Member is a party deeply interested in the establishment of his right to an honorable office. The people of the district, especially, and the people of the whole country are interested in the question who shall have a voice in framing the laws. The votes are received by election officers, who see the voter in person, who acts publicly in the presence of the people, who may administer an oath to the person offering to vote, and who are themselves sworn to the performance of their duties. The judgment of these officers ought not to be reversed and the grave interests of the people imperiled by the admissions of persons not under oath and admitting their own misconduct.

The practice of admitting this kind of evidence originated in England. So far as it has been adopted in this country it has been without much discussion of the reasons on which it was founded. In England, as has been said, the vote was viva voce. The fact that the party voted, and for whom, was susceptible of easy and undisputable proof by the record. The privilege of voting for members of Parliament was a franchise of considerable dignity, enjoyed by few. It commonly depended on the ownership of a freehold, the title to which did not, as with us, appear on public registries, but would be seriously endangered by admissions of the freeholder which disparaged it. An admission by the voter of his own want of qualification was therefore ordinarily an admission against his right to a special and rare franchise, and an admission which seriously impaired his title to his real estate, an admission so strongly against the interest of the party making it would seldom be made unless it was true. It furnishes no analogy for a people who regard voting not as a privilege of the few, but as the right of all; where the vote, instead being viva voce, is studiously protected from publicity, and where such admissions, instead of having every probability in favor of their truth, may so easily be made the means of accomplishing great injustice and fraud, without fear either of detection or punishment.

It may be said that the principle of the secret ballot protects the voter from disclosing how he voted, and, in the absence of power to compel him to testify and furnish the best evidence, renders the resort to other evidence necessary. The committee are not prepared to admit that the policy which shields the vote of the citizen from being made known without his consent is of more importance than an inquiry into the purity and result of the election itself. If it is, it can not protect the illegal voter from disclosing how he voted. If it is, it would be quite doubtful whether the same policy should not prevent the use of the machinery of the law to discover and make public the fact in whatever way it may be proved. It is the publicity of the vote, not the interrogation of the voter in regard to it, that the secret ballot is designed to prevent. There would seem to be no need to resort to hearsay evidence on this ground, unless the voter has first been called, and, being interrogated, asserts his privilege and refuses to answer. Even in that case, a still more conclusive objection to hearsay testimony of this character is this: It is not at all likely to be either true or trustworthy.

The rule that admits secondary evidence when the best can not be had only admits evidence which can be relied on to prove the fact, as sworn copies when an original is lost, or the testimony of a witness to the contents of a lost instrument. Hearsay evidence is not admitted in such cases, and is only admitted in cases where hearsay evidence is, in the ordinary experience of mankind, found to be generally correct, as in matters of pedigree and the like. But a man who is so anxious to conceal how he voted as to refuse to disclose it on oath, even when the disclosure is demanded in the interest of public justice, and who is presumed to have voted fraudulently—for otherwise, in most cases, the inquiry is of no consequence—would be quite as likely to have made false statements on the subject, if he had made any. To permit such statements to be received, to overcome the judgment of the election officers, who admit the vote publicly, in the face of a challenge, and with the right to scrutinize the voter, would seem to be exceedingly dangerous.

The action of the House heretofore does not seem to have been so decided or uniform as to preclude it from now acting upon what may seem to it the reasonable rule, even if it should think it best to reject this claw of evidence wholly. But as both parties have taken their evidence, apparently with the expectation that this class of evidence would be received, and as, in view of the numerous and respectable authorities, it is not unlikely the House may follow the English rule, we have applied that to the evidence, with the limitation, of the reasonableness of which it would seem there can be no question, that evidence of hearsay declarations of the voter can only be acted upon when the fact that he voted has been shown by evidence aliunde, and when the declarations have been clearly proved, and are themselves clear and satisfactory.

886. The case of Cessna v. Meyers, continued.

Discussion of the meaning of the words "residence" and "domicile" as related to the qualifications of a voter.

Persons working on a railroad and expecting to go thence on the completion of the work may nevertheless be considered as having a voting residence.

Sojourners in a place for the sole purpose of study at a college may or may not have a legal residence therein.

Discussion of the law of residence as applied to paupers.

On the merits of the case the committee settled certain legal principles, as determining the result. The constitution of Pennsylvania provided as follows:

Article III, section 1. In elections by the citizens every (white) freeman of the age of twenty-one years, having resided in this State one year, and in the election district where he offers to vote ten days immediately preceding such election, and within two years paid a State or county tax, which shall have been assessed at least ten days before the election, shall enjoy the rights of an elector. But a citizen of the United States who had previously been a qualified voter of this State, and removed therefrom and returned, and who shall have resided in the election district and paid taxes as aforesaid, shall be entitled to vote after residing in the State six months: *Provided*, That (white) freemen citizens of the United States, between the ages of twenty-one and twenty-two years, and having resided in the State one year and in the election district ten days as aforesaid, shall be entitled to vote although they shall not have paid taxes.

Interpreting this constitution the committee took the following grounds as to the law of domicile:

It is claimed by the contestant that a considerable number of those who voted for his competitor lacked the qualification of residence in the election district. The largest number to whom this objection applies came into the election district for the purpose of working upon a railroad in process of construction therein, were employed in building said railroad, and were not proved to have formed any intention to reside in the district after its completion. The length of time which the completion of the road would be likely to occupy was not distinctly proved, but it was shown that persons who were in fact at work upon it continued in the district for a longer period than eighteen months. The committee have carefully considered the legal question which is thus raised.

The word "residence" used in the constitution of Pennsylvania in describing the qualification of voters is equivalent to "domicile," not in the sense in which a man may have a commercial domicile or residence in one country while his domicile of origin and of allegiance is in another, but in the broadest sense of the term. As it is upon the meaning of this word that the case chiefly turns, it will be well to consider it a little more fully.

The word "domicile," or "residence," as used in law, is incapable of exact definition. Inquiries into it are very apt to be confused by taking the tests which have been found satisfactory in some cases and attempting to apply them as inflexible rules in all. Probably the definition which is most expressive to the American mind is that a man's domicile is "where he has his home." Two or three rules, however, are well established. A man must have a domicile somewhere; a domicile once gained remains until a new one is acquired; no man can have two domiciles at the same time. With these exceptions, it will, we believe, be found that nearly every rule laid down on the subject in the books, even if generally useful, fails to be of universal application, and would be opposed to the common sense of mankind if extended to some states of fact that may arise. For instance, Vattel defines domicile to be a fixed residence in any place with an intention of always staying there. On this Judge Story (Conflict of Laws, sec. 43) well remarks:

"This is not an accurate statement. It would be more correct to say that that place is properly the domicile of a person in which his habitation is fixed without any present intention of removing therefrom."

But certainly Judge Story's definition is not much better. A man's domicile remains after he forms the intention of removing therefrom, and sometimes even after he removes, until he gets another. A man may acquire a domicile, if he be personally present in a place and elect that as his home, even if he never design to remain there always, but design at the end of some short time to remove and acquire another. A clergyman of the Methodist Church, who is settled for two years, may surely make his home for two yews with his flock, although he meant, at the end of that period, to remove and gain another. So of the principle upon which the contestant most relies in the present case.

He claims—and many expressions can be found used by commentators and in judicial decisions which seem to support the claim—that personal presence in a place with intent to remain there only for a limited time and for the accomplishment of a temporary purpose, and to depart when that purpose is accomplished, will not constitute a residence. This is true as a general rule. It is true of those persons, probably the greater number, who, while so present and engaged in business, have some other principal seat of their interests and affections elsewhere. Most men have some permanent home, the claim of which outweigh those of a place of temporary sojourn. The place where a man's property is, where his family is, the place to which he goes back from time to time whenever no temporary occasion calls him elsewhere, the domicile of his origin, where the permanent and ordinary business of his life is conducted—that is to the ordinary man the place of his home. But we are now dealing with a claw of persons who have no property, who have no family, or whose family moves with them from place to place, who have no place to return to from temporary absences, the domicile of whose origin is in another country, and has been in the most solemn manner renounced, and the ordinary business of whose life consists in successive temporary employments in different places.

Suppose a man, single, with no property, to come from Ireland and be employed all his life on railroads or other like works in different places in succession. If he does not acquire a residence he can never become a citizen, because he never would reside in this country at all. It seems to us that to such persons the general rule above stated does not apply. But where a man who has no interests or relations in life which afford a presumption that his home is elsewhere, comes into an election district for the purpose of working on a railroad for a definite or an indefinite period, being without family or having his family with him, expecting that the question whether he shall remain or go elsewhere is to depend upon the chances of his obtaining work, having abandoned, both in fact and in intention, all former residences, and intends to make that his home while his work lasts—that will constitute his residence, both for the purpose of such jurisdiction over him as residence confers and for the purpose of exercising his privileges as a citizen. Of course the intent above supposed must be in good faith and an intent to make such district the home for all purposes. The party's intent to vote in the district where he is, he knowing all the time that his home is elsewhere, will not answer the law.

The rule is stated by Chief Justice Shaw, in Lyman *v.* Fiske (5 Peck, 234) as follows: "It is difficult

to give an exact definition of habitancy. In general terms, one may be designated as an inhabitant of that place which constitutes the principal seat of his residence, of his business pursuits, connections, attachments, and of his political and municipal relations. It is manifest, therefore, that it embraces the fact of residence at a place with the intent to regard it his home. The act and the intent must concur, and the intent may be inferred from declarations and conduct. It is often a question of great difficulty, depending upon minute and complicated circumstances, leaving the question in so much doubt that a slight circumstance may turn the balance. In such a case the mere declaration of the party, made in good faith, of his election to make the one place rather than the other his home, would be sufficient to turn the scale."

The article in the appendix to volume 4 of Doctor Lieber's Encyclopedia Americana, title Domicile written by Judge Story, is, perhaps, the best treatise on this subject to be found. He says: "In a strict and legal sense, that is properly the domicile of a person where he has fixed his true, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning." It is often mere question of intention. If a person has actually removed to another place, with an intention of remaining there for an indefinite time and as a place of present domicile, it becomes his place of domicile, notwithstanding he may have a floating intention to go back at some future period. A fortiori would this be true if his "floating intention" were to go elsewhere in future and not to go back, as in such case the abandonment of his former home would be complete.

In the Allentown election case (Brightly's Lead. Cases on Elections, 475) it is said: "Unmarried men, who have fully severed the parental relation, and who have entered the world to labor for themselves, usually acquire a residence in the district where they are employed, if the election officers be satisfied they are honestly there pursuing their employment, with no fixed residence elsewhere, and that they have not come into the district as 'colonizers,' that is, for the mere purpose of voting, and going elsewhere as soon as the election is held." "The unmarried man who seeks employment from point to point, as opportunity offers, and who has severed the parental relation, becomes a laborer, producing for himself, and thus adds to the productive wealth of the community in which he resides, being willing not only to enjoy political privileges, but also to assume and discharge political and civil duties." A fortiori would this reasoning apply to the married laborer who takes his family with him.

The habits of our people, compared with many other nations, are migratory. To persons, especially young men, in many most useful occupations the choice of a residence is often experimental and temporary. The home is chosen with intent to retain it until the opportunity shall offer of a better. But if it be chosen as a home, and not as a mere place of temporary sojourn, to which some other place, which is more truly the principal seat of the affections or interests, has superior claim, we see not why the policy of the law should not attach to it all the privileges which belong to residence, as it is quite clear that it is the residence in the common and popular acceptation of the term.

The case of Barnes *v.* Adams (3 Con. El. Cas., 771) does not, when carefully examined, conflict with these rules. The passage cited from that case is not a statement of the grounds on which the House or even the committee determined the case, but a concession to the party against whom it was decided. It therefore, if it bore the meaning contended for, would not be authority in future cases. But the language taken together, it seem to us, means only that going into an election precinct for a temporary purpose, with the intent to leave it when that purpose is accomplished, no other intent and no other fact appearing, is not enough to gain a residence. In this view, it is not in conflict with the opinion here expressed.

It is true that, as was remarked in the outset, a former residence continues until a new one is gained. But in determining the question whether a new one has been gained, the fact that everything which constituted the old one—dwelling house, personal presence, business relations, intent to remain—has been abandoned is a most significant fact.

The above principles are then applied.

(a) To a class of railroad laborers and contractors—

The cases of the railroad laborers and contractors should be disposed of by the following rules:

1. Where no other fact appears than that a person, otherwise qualified, came into the election district for the purpose of working on the railroad for an indefinite period, or until it should be completed, and voted at the election, it may or may not be true that his residence was in the district. His vote

having been accepted by the election officers, and the burden being on the other side to show that they erred, we are not warranted in deducting the vote.

2. Where, in addition, it appears that such voter had no dwelling house elsewhere, had his family with him, and himself considered the voting place as his home until his work on the railroad should be over, we consider his residence in the district affirmatively established.

3. On the other hand, where it appears that he elected to retain a home, or left a family or a dwelling place elsewhere, or any other like circumstances appear, negativing a residence in the voting precinct, the vote should be deducted from the candidate for whom it is proved to have been cast.

(b) As to certain students—

The principles applicable to the students are not dissimilar. The law, as it applies to this class of persons, is fully and admirably stated by the supreme court of Massachusetts, in an opinion given to the legislature, and reported in Fifth Metcalf, and which is cited with approbation in nearly all the subsequent discussions of the subject. Under the rule there laid down, the fact that the citizen came into the place where he claims a residence for the sole purpose of pursuing his studies at a school or college there situate, and has no design of remaining there after his studies terminate, is not necessarily inconsistent with a legal residence, or want of legal residence, in such place. This is to be determined by all the circumstances of each case. Among such circumstances the intent of the party, the existence or absence of other ties or interests elsewhere, the dwelling place of the parents, or, in the case of an orphan just of age, of such near friends as he had been accustomed to make his home with in his minority, would of course be of the highest importance. (See Putnam *v.* Johnson, 10 Mass., 488.)

(c) As to paupers—

The case of the paupers presents greater difficulty. Under the laws of Pennsylvania it is conceded they may be entitled to vote. In several contested election cases cited by the contestant it is stated by the committee that, in the absence of statute regulations on the subject, a pauper abiding in a public almshouse, locally situated in a different district from that where he dwells when he becomes a pauper, and by which he is supported, away from his original home, does not thereby change his residence, but is held constructively to remain at his old home. (Monroe *v.* Jackson, 2 Elect. Cas., 98; Covode *v.* Foster, Forty-first Congress; Taylor *v.* Reading, Forty-first Congress.)

And there are some strong reasons for this opinion. The pauper is under a species of confinement. He must submit to regulations imposed by others, and the place of his abode may be changed without his consent. Having few of the other elements which ordinarily make up a domicile, the element of choice also in his case almost wholly disappears. There are also serious reasons of expediency against permitting a class of persons who are necessarily so dependent upon the will of one public officer to vote in a town or district in whose concerns they have no interest. On the other hand, the pauper's right to vote is recognized by law. It can practically very seldom be exercised except in the near neighborhood of the almshouse. In the case of a person so poor and helpless as to expect to be a lifelong inmate of the poorhouse it is, in every sense in which the word can be used, really and truly his residence—his home. And it is important that these constitutional provisions as to suffrage should be carried out in their simplest and most natural sense, without the introduction of artificial or technical construction. It will, however, be unnecessary to determine this question, as will hereinafter appear.

In accordance with these conclusions the committee reported that the sitting Member, Mr. Meyers, was entitled to hold his seat, and a resolution to that effect was presented.

On March 12[1] the report was debated and the resolution of the committee was agreed to without division.

887. The Alabama election case of Norris v. Handley in the Forty-second Congress.

The House can not be precluded from going behind the returns by the fact that a State law gives canvassers the right to reject votes for fraud or illegality.

[1] Journal, p. 495; Globe, p. 1610.

The decision of a board of canvassers as to the legality of votes, made in pursuance of State law, is regarded as prima facie correct.

It is an extraordinary and dangerous policy for a State law to lodge in canvassing officers the power to reject votes.

General testimony that voters were deceived by false tickets, etc., does not, in the absence of specific proof, justify the rejection of a poll.

General intimidation may not be proven solely by hearsay and general reputation without specific testimony of the voters.

A comparison of the votes cast with the population may be admitted as bearing on the question of intimidation.

On March 14, 1872[1] Mr. George W. McCrary, of Iowa, from the Committee of Elections, presented the report of the committee in the contested case of Norris *v.* Handley, of Alabama. The sitting Member had been returned by a certified majority of 3,142. The contestant alleged that this majority had been procured by fraud, violence, and intimidation.

At the outset the committee discuss a question as to the power of canvassing officers:

The statute of Alabama, defining the powers and duties of the board of county canvassers or supervisors of elections, provides as follows:

"That it shall be the duty of the board of supervisors of elections, upon good and sufficient evidence that fraud has been perpetrated or unlawful or wrongful means resorted to to prevent electors from freely and fearlessly casting their ballots, to reject such illegal or fraudulent votes cast at any such polling place, which rejection so made as aforesaid shall be final unless appeal is taken within ten days to the probate court." (Acts of 1868, p. 277, sec. 37.)

Another section provides that this "board of supervisors of elections "shall be composed of the judge of probate, sheriff, and clerk of the circuit court in each county.

In the opinion of the committee it is not competent for the legislature of a State to declare what shall or shall not be considered by the House of Representatives as evidence to show the actual votes cast in any district for a Member of Congress, much less to declare that the decision of a board of county canvassers, rejecting a given vote, shall stop the House from further inquiry. The fact, therefore, that no appeal was taken from the decision of the board of canvassers, rejecting the vote of Girard precinct, can not preclude the House from going behind the returns and considering the effect of the evidence presented.

The committee in another place comment again on this power lodged with the board of canvassers:

Although this is an extraordinary, not to say a dangerous, power when placed in the hands of a board of this character, with such inadequate facilities for obtaining legal evidence and deciding upon questions of fraud, yet it is believed by the committee that the action of such a board, under the statute in question and in pursuance of the power conferred thereby, is to be regarded as prima facie Correct, and to be allowed to stand as valid until shown by evidence to be illegal or unjust.

Having thus discussed the powers of the canvassing officers under the law, the committee considers their action in rejecting certain returns from Macon County.

The testimony of but one witness has been taken in relation to the rejection of these votes in Macon County, and that is the testimony of J. T. Menafee, judge of probate, and ex officio one of the board of canvassers. He testifies that the board spent several days in the work of revising the vote of the county.

They had no evidence before them, however, except the registration list and the poll list. The former is shown to have been exceedingly imperfect and unreliable and can not be considered such

[1] Second session Forty-second Congress, House Report No. 33; Smith, p. 68.

"good and sufficient evidence" as the statute requires to justify the board in rejecting the votes in question.

The presumption is strongly in favor of the legality of a vote which has been received by the officers provided by law for that purpose; and the question is whether this presumption can be overcome by evidence so unsatisfactory as that upon which the board acted. The board were empowered by the statute we have quoted to obtain evidence of the alleged illegality and fraud practiced at the precincts named, and they were not limited to an examination of the registration list and the poll list. Since no evidence was taken it is our opinion that the decision of the officers of election at the various precincts, admitting the votes in question, is entitled to greater weight than the action of the board of canvassers in throwing them out. The former had the voters before them and the power to examine them as to their qualifications, while the latter, in our judgment, had no reliable evidence before them upon which to act.

The contestant had asked that 325 votes be stricken from sitting Member's return for Silver Run, Russell County, on the ground that 325 voters who would have voted for contestant were deceived into voting for sitting Member. In support of this several witnesses testified what they had heard or read in the newspapers; others gave their opinions as to the proportion of black and white people who voted. One witness swore that he saw tickets of sitting Member's party headed with the name of contestant's party and believed that the freedmen were deceived thereby. As to this the committee say:

When, however, an attempt is made to say, from the evidence before us, with anything like accuracy, how many voters, if any, were in this manner deceived, it will be found impossible. If the facts be as contestant claim, it was within his power to prove them by evidence, at least, reasonably satisfactory. He should have proven the number of votes cast, and for whom cast, by the returns, or a certified copy thereof. He should have shown the names of the persons who voted by the poll list, and he should have called the voters themselves, or some of them, to prove how many and who intended to vote for him and were defrauded by being furnished a ticket resembling the Republican ticket, but containing the name of the sitting Member as a candidate for Congress. As the evidence is presented to us, it would not justify any action unless it might possibly be the rejection of the vote of the precinct, which would vary the general result by only 140 votes. If there was a fraud perpetrated, and we are inclined to the opinion, from the scanty evidence before us, that there was, it is utterly impossible to determine how many votes contestant lost and his competitor gained thereby.

In accordance with the principles set forth as above, the committee purged the returns, but found that there still remained a majority of nearly 2,000 votes for sitting Member.

There remained, then, a question as to violence and intimidation, alleged by contestant, which became the material question of the case. The committee say at the outset:

Upon this subject it is to be observed, in the first place, that the evidence is exceedingly vague and unsatisfactory. It would seem that if over two thousand electors were deterred from voting by violence, threats, or intimidation, some of these electors could be found to come forward and swear to the fact. Your committee think that it would establish a most dangerous precedent to allow a fact of this character, so easily established by the direct and positive testimony of so many witnesses, to be proven solely by hearsay and general reputation. We have not forgotten nor overlooked the fact that the same state of things which would make men afraid to vote for a particular party might also make it difficult to secure testimony in behalf of that party. But in many parts of the district where testimony, was taken there is no pretense that witnesses were intimidated; and, besides, if the contestant had shown to the satisfaction of the House that witnesses needed the protection of the Federal Government in order to be safe in testifying fully and freely, that protection would have been afforded at any cost. In the volume of testimony taken to prove the fact of general and wide-spread intimidation, not one

witness is found who testifies that he himself was prevented from voting by reason of intimidation. They all testify to what they have heard others say, to the common rumor, and general reputation. There can be no doubt that testimony of this character ought to be held insufficient of itself to establish the fact of intimidation. It ought at least to be corroborated by other facts, such as the unexplained failure of large numbers of those alleged to have been intimidated, to vote, before the House could safely act upon it.

Nevertheless the committee considered the evidence, and determined that it fell short of sustaining the contestant's allegations. It appeared that there was no phenomenal suppression of the vote in the district, since a comparison of the vote with the population, tested in the light of the usual ratio of voters to population, showed that the total vote fell short of what might have been expected by only 581 persons. This effectually disproved, taken with the weakness of the direct testimony, the contention that 2,000 or more voters were deterred from voting. In conclusion the committee say:

It must not be supposed that the committee have overlooked or failed to consider the fact that gross wrongs and outrages are shown by the evidence to have been inflicted upon some of the freedmen in the district in question. Threats were undoubtedly made against this class of voters of personal injury or dismissal from employment in case they voted the Republican ticket, and these threats were carried out after the election, in several instances at least, in the brutal whipping of a number of freedmen in the night time by disguised men, and by the dismissal of others from employment. Several churches, occupied by freedmen for worship, were prior to the election burned down. Several cases of apparently unprovoked murder are in proof, and several cases of shooting and wounding. A white woman, who had been a teacher among the freedmen, was compelled to flee in the night time from her home, and a freedman who was a preacher among his people was at the same time brutally murdered. Other cases similar in character are in proof, and it does not appear that the perpetrators of a single one of these outrages have ever been tried or punished, or that any vigorous or determined effort has been made to apprehend or punish any of the criminals. These crimes were well calculated to alarm and intimidate the colored people, and it must be said to their great credit that, in spite of all the dangers and difficulties, the great body of them did in fact exercise their right to vote, many of them traveling 10, 15, and even 20 miles from their homes for that purpose. These outrages, therefore, do not invalidate the election, because they did not intimidate the freedmen. We call attention to them now, to denounce them as most infamous, and to show that they have not escaped our attention.

The committee therefore, in view of the conclusions reached by them, recommended a resolution declaring:

Resolved, That W. A. Handley is entitled to retain his seat in this House as Representative from the Third district of Alabama.

On April 4 [1] this resolution, after an explanatory speech by Mr. McCrary, was agreed to without division.

888. The Indiana election case of Gooding v. Wilson, in the Forty-second Congress.

Official and formal counts should be set aside on subsequent, informal, and unofficial counts only when the ballots are inviolably kept and the subsequent count is safeguarded.

A vote being admitted should not be rejected on evidence that merely throws a doubt on it.

Should the fact that judges of election are not freeholders as required by law impair their acts as de facto officers?

[1] Journal, p. 631; Globe, p. 2172.

Does the absence from the returns of certificates prescribed by law vitiate an election of which the result may be known from other legal returns?

As to the sufficiency of ballots bearing only the last name of the candidate.

On April 9, 1872,[1] Mr. Aaron F. Perry, of Ohio, from the Committee on Elections, presented the report of the majority of the committee in the Indiana contested case of Gooding *v.* Wilson. The sitting Member had been returned by an official majority of 4 votes. Contestant assailed this result on two grounds: The correctness of the count and the legality of certain votes.

(1) As to the correctness of the count, the majority report says:

The proof of these mistakes, all except one, consists in evidence of subsequent informal and unofficial counts, made at a considerable time after the election; and as to the one exception, the proof, if such it can be called, is even less satisfactory.

On examination of precedents, it does not appear that this House favors the setting aside of official and formal counts, made with all the safeguards required by law, on evidence only of subsequent informal and unofficial counts, without such safeguards. No instance was cited at the hearing where the person entitled by the official count was deprived of his seat by a subsequent unofficial count. On principle it would seem that if such a thing were, in the absence of fraud in the official count, in any case admissible, it should be permitted only when the ballot boxes had been so kept as to be conclusive of the identity of the ballots, and when the subsequent count was made with safeguards equivalent to those provided by law. In the absence of either of these conditions, the proof, as mere matter of fact and without reference to statutory rules, would be less reliable and therefore insufficient.

In the present case both of these conditions are wanting. The ballot boxes were not kept in a way to be conclusive of the identity of the ballots, nor were the subsequent counts conducted in a way to entitle them to credit as against the official count.

The statute of Indiana requires at each poll, in addition to other officers, an officer called an inspector, who is required to preserve the ballots, one poll book, and a tally paper six months after the election, except when such election is contested; then they shall be preserved, subject to the order of any court trying such contest, until the same is determined. The official count appears to have been a careful one. The three unofficial counts differed each from the other, and all differed from the official one. Neither of the unofficial counts was made under circumstances to command confidence as against the official count.

In the debate[2] Mr. George W. McCrary, of Iowa, elaborated this more fully:

I do say that there is great danger in setting aside the official count and substituting for it an unofficial count in any case. * * * In the first place, if the law provides an officer whose duty it is to hold possession of the ballot boxes and the ballots themselves after the polls have been closed, I think that no recount should ever be allowed unless it appear that the ballot boxes and ballots had remained in the custody of that officer during the interval between the election and the recount. That ought always to be one of the prerequisites, and without it there can be neither certainty nor safety. * * * It must appear that the ballots have been securely kept, that they have not been exposed, and that there has been no opportunity to tamper with them. This ought to appear affirmatively. * * * If the law provides the mode of preserving the ballots, and of having them recounted, that mode should in every case be strictly followed. * * * Now, in the State of Indiana there is such a law. * * * Now, Mr. Speaker, this law was violated in the case of every one of these recounts. They should have subpoenaed before the court trying the contest in this case the inspector of the election, who was the legal custodian of the ballot box, and should have shown by his testimony that the ballot box had remained in his possession, and had been so securely and carefully kept that it could not have been

[1] Second session Forty-second Congress, House Report No. 41; Smith, p. 79.[2] Globe, p. 2655.

tampered with. The identity of the ballots must always be shown by the legal custodian of them. * * * The House can not depend upon a recount made by any outsider who goes surreptitiously or otherwise and gets possession of the ballot box. It must be done in the presence of the court or of an officer. * * * In this case neither of the things has been done.

The minority views, presented by Mr.,W. E. Arthur, of Kentucky, did not argue this point at length, but in the debate,[1] Mr. Arthur went into the precedents of the House at length to justify the recounts. In reply it was asserted that while committee reports had sometimes justified an unofficial count, the House had never acted upon the result of such recount.[2]

There was also a difference, of opinion as to the sufficiency of the testimony on the custody of the ballots and the carefulness of the unofficial recount.

A second question related to legality of certain votes cast for sitting Member. The majority of the committee thus dispose of this point:

Most of the questions were questions of residence or nonresidence. Evidence which might have been sufficient to put the voter to his explanation, if challenged at the polls, is not deemed sufficient to prove a vote illegal after it has been admitted. Nor has the mere statement by a witness that a voter was or was not a resident, without giving facts to justify his opinion, been considered sufficient to throw out such a vote. The testimony shows a number of instances where a witness would state positively the residence or nonresidence of a voter on some theory of his own, or some mistake of fact, when other testimony would show with entire clearness that the vote was legal. The adoption of laxer rules of evidence would affect both sides, and change the result very little, if at all. After a vote has been admitted, something more is required to prove it illegal than to throw doubt upon it. There ought to be proof which, weighed by the ordinary rules of evidence, satisfies and convinces the mind that a mistake has been made, and which the House can rest upon as a safe precedent for like cases. In regard to most of the alleged illegal votes on both sides, the proof, however plausible, falls short of the requirement.

In accordance with the principles set forth in its report, the majority of the committee find for sitting Member a clear majority of 8 votes.

This did not render it necessary for the majority of the committee to investigate certain objections made by the sitting Member to returns and votes affecting the poll of the contestant.

The minority, as part of their argument—

(1) The minority views say:

Contestee has alleged and proved that some one or more of the acting judges of election at the following-named precincts were not at the time freeholders; that they were therefore ineligible; and that the entire vote and return of such precincts must be rejected, to wit: [Here follows an enumeration of 20 precincts.]

And contestee has insisted that the question of ineligibility involved in these specifications is decisive of the case in his favor. By excluding the entire vote of the legal voters of those 20 precincts he claims his majority will then be more than 300 over contestant, even if "other matters attempted to be proven for contestant be taken in his favor."

The officers all acted under appointment; all acted in good faith; were all sworn; no objection at the time was raised; no other person claimed the position, and the entire people acquiesced in their official acts.

The law of Indiana required that every judge of election should be a freeholder.

Under the circumstances above recited, if a person acted as a judge of election who at the time was ineligible to that position, for want of the qualification required by the statute, must the election of that precinct for that cause be held void, and the votes and returns be set aside and rejected?

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[1] Globe, pp. 2657, 2658.

[2] Speech of Mr. George F. Hoar, of Massachusetts, Globe, p. 2667.

Contestee says yes, and appeals to the law and the precedents. We say no; and we go further, and say that the great preponderance of both law and precedent is on the side of the negative of that question. The result of a very patient investigation of the election cases of this House is the conclusion on our part that the rule is substantially that—

Ineligibility or want of statutory qualification on the part of an officer of election, otherwise capable, and acting in good faith, and with the acquiescence of the voting public, will not, of itself, vitiate or impair the poll or return. (Barnes *v.* Adams, Dig. El. C., 760; Eggleston *v.* Strader, ibid., 897.)

(3) As to the certificate of a certain precinct:

1. Contestee alleged and proved that the law of the State of Indiana required the board of judges of the election to make out an attested certificate in written words of the number of votes each person received, etc., and return the same, together with the list of voters, and one of the tally papers, to the county board; and that the board of judges of West precinct, township of Hendricks, county of Shelby, failed to return such certificate. The proof shows that this failure was an innocent inadvertence. The poll lists, tally papers, and ballots were all properly returned, and are unimpeached.

Contestee insists that the omission of that certificate vitiates that poll, and that the returns and votes of that precinct should be rejected from the count. And he insists upon it with great confidence, and cites authorities in support of the position, all of which we have carefully examined.

We respectfully submit that his authorities do not sustain his position in this case. And these, when carefully considered, along with those numerous other authorities directly in point, to which he has not referred, have brought us to a conclusion directly the opposite of that insisted on by contestee.

Is such a certificate indispensable? We say it is not, and so say the authorities. The rule as established by the courts and by the precedents of the House is substantially as follows:

In the absence of the certificate prescribed by law, recourse will be had to the poll lists, the ballots, or other returns; and if from these, or any of them, the result can be ascertained, and there is no taint of fraud, effect will be given to the result precisely as though the certificate was present. (Chrisman *v.* Anderson, 2 El. C., 331–334; Blair *v.* Barrett, 2 El. C., 315.)

(4) As to the sufficiency of a ballot:

At the precinct in the township of Brandywine, county of Shelby, two ballots were counted for contestee which had on them for Congress merely the letters "Wilson." On their face the ballots were ambiguous and unintelligible. The defect was curable by extrinsic evidence to explain and apply them; it has not been offered, and the defect is fatal to both ballots, and they are deducted from contestee's vote in this count.

The minority, in accordance with their conclusion, found for contestant a majority of 17 votes, and accordingly recommended the following as a substitute for the resolution of the majority:

Resolved, That Jeremiah M. Wilson was not duly elected and is not entitled to the seat in the Forty-second Congress from the Fourth district of the State of Indiana.

Resolved, That David S. Gooding was duly elected and is entitled to the seat in the Forty-second Congress from the Fourth district of the State of Indiana, and should be admitted to his seat.

On April 22[1] the report was debated at length, and the proposition of the minority was negatived, yeas 64, nays 105. Then the majority resolution was agreed to without division, and sitting Member retained the seat.

889. The election case of Burleigh and Spink v. Armstrong, from Dakota Territory, in the Forty-second Congress.

The House rejected votes cast at a precinct on an Indian reservation which was by law excluded from the domain of a Territory.

The House counted votes cast at a precinct within a military reservation

[1] Journal, pp. 723, 724; Globe, pp. 2654–2670.

tion of which the title and jurisdiction were temporarily with the United States by Executive order.

On April 12, 1872,[1] Mr. M. M. Merrick, of Maryland, from the Committee on Elections, submitted the report of the committee in the case of Burleigh and Spink *v.* Armstrong, of Dakota Territory. The official returns gave Spink 1,023 votes, Burleigh 1,102, and Armstrong 1,198. Accordingly the certificate was issued to Mr. Armstrong, and he was sworn in.

The first question which arose was as to the legality of certain votes cast upon United States military reservations:

> By the law organizing the Territory of Dakota (12 Stat. L., p. 239) it is provided that the Territory of Dakota shall not include any territory which, by treaty with any Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the Territory of Dakota until said tribe shall signify their assent to the President of the United States to be included in said Territory, or to affect the authority of the Government of the United States to make any regulations respecting such Indians, their lands, property, or other rights by treaty, law, or otherwise, which it would have been competent for the Government to make if the act had been passed. It is quite apparent from the terms of this organic act that it was not competent for the authorities of the Territory to hold an election or exercise any other jurisdictional act within any part of the Indian reservations embraced within the exterior bounds of the Territory, and the proof establishing the fact that the Buffalo, or Fort Thompson, precinct was established, and the election there held within an existing Indian reservation, the committee have excluded all the votes cast there from their computation. But with regard to the election held within the military reservations of Fort Sully and Fort Randall (or the Ellis precinct), the committee have reached the conclusion that there is nothing in the terms of the organic act nor in the general policy of the law forbidding an election to be held at such places. The contestants have insisted that the rule which disqualifies persons from voting within any State, who reside within forts or other territory to which the title and jurisdiction has been ceded by the State to the Federal Government, applies to the military reservations which have been designated by the Executive within the Territories belonging to the United States. But forasmuch as there is no conflict of sovereignty between the Government and the Territory, and the latter holds all its jurisdiction in subordination to the controlling power of Congress, and the military reservations are not permanently severed from the body of the public lands, but are simply set apart and withheld from private ownership by an Executive order to the Commissioner of the Land Office, and may be and often are restored to the common stock of the public domain, when the occasion for their temporary occupancy has ceased, at the pleasure of Congress, and which requires no concurrent act of any State authority to give it efficacy, the residents upon such reservations, although abiding thereon by the mere sufferance of the United States authorities, do not in any just sense cease to be inhabitants or residents of the Territory within which such military reserve may be situated. Such residents seem to the committee to have that same general interest in the welfare of the community in which they live and the same right to vote there as any of the workmen at the arsenal or navy-yard in Washington City, who may be allowed to sojourn within their limits, have to vote at elections within the District of Columbia for officers of its Territorial government, or for a Delegate in Congress from that District.

As to charges of illegal voting by Indians and nonresidents, the committee found evidence of great irregularities, but the testimony failed to show that one candidate had profited more than another by them.

Therefore the committee reported a resolution confirming the title of sitting Delegate to the seat.

On January 22, 1873,[2] the resolution reported by the committee was agreed to without division.

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[1] Second session Forty-second Congress, House Report No. 43; Smith, p. 89.

[2] Third session Forty-second Congress, Journal, p. 230; Globe, p. 794.

890. The Florida election case of Niblack v. Walls in the Forty-second Congress.

Instance wherein the time of taking testimony in an election case was twice extended.

A return impeached by the evidence of an election officer is rejected as worthless and is not received for any purpose.

Returns impeached on their face and forwarded irregularly were not, counted by the House until explained by evidence.

The law requiring a return to be signed by three officers, at least two must sign to make the certificate evidence.

On January 21, 1873,[1] Mr. George W. McCrary, of Iowa, from the Committee of Elections, submitted the report in the Florida case of Niblack *v.* Walls. The State canvassers had so certified the result as to show a majority of 629 for the sitting Member, but had reached this result by rejecting the returns from 8 counties, where the returns had given contestant a majority of 821 votes. By admissions and waivers the returns from 5 of these counties were admitted before the committee, so there were left in issue the counties of Lafayette, Manatee, and Brevard, where the returns gave contestant 335 votes and sitting Member 3 votes.

The time for taking testimony was twice extended—once on February 9, 1872,[2] so as "to take testimony within the period of sixty days after the passage of this act," and again on May 29, 1872,[3] in accordance with the resolution recited later.

(1) The first question which the committee considered arose from the returns of Lafayette County, which gave 152 votes for contestant and none for sitting Member. The county canvassers had rejected three of the precincts of the county and counted but two. Of the returns from this county the report says:

> This return is rendered worthless by the testimony of William D. Sears, sheriff of LaFayette County, and a member of the board of county canvassers.
>
> This witness swears that at New Troy precinct, which is one of the two precincts counted, there were at least 42 votes cast and counted out for the sitting Member; a fact he knows from having been present at the counting of the vote, and yet by the return every vote is given to contestant.
>
> The same facts, in substance, are shown by the evidence of Redden B. Hill, another member of the board of canvassers. (See pp. 11 to 14, inclusive, of evidence.)
>
> Other objections are raised to this return, but they need not be considered, for this testimony successfully impeaches it, and shows that it is tainted with fraud, and must therefore be rejected.
>
> We are left, then, to the inquiry, What votes have been proven by evidence outside of this return?
>
> Upon looking into the evidence upon this point, we find that there is no proof whatever as to the actual state of the vote at the precincts of New Troy and Summerville, which are the two which purport to have been included in said return, except the proof, already mentioned, that the sitting Member received at New Troy at least 42 votes. The vote of these two precincts, in which contestant claims 152 votes, must therefore be rejected, because the return is shown to be void for fraud, and no secondary evidence is offered to take its place.
>
> It is suggested by counsel that we might allow the 152 votes which, according to this return, were cast for contestant, and also allow the sitting Member the 42 votes which are shown to have been cast for him and not returned. But the committee hold that, it having been shown that the return is fraudulent and false in a matter so material as the suppression altogether of the whole of the sitting Member's vote, it can not be received for any purpose.

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[1] Third session Forty-second Congress, House Report No. 41; Smith, P. 101.

[2] Second session Forty-second Congress . Journal, p. 312; Globe, p. 929.

[3] Journal, p. 1008; Globe, p. 3984.

(2) As to Manatee County:

The returns from this county were thrown out for the following reasons:

First. Because the returns made by the county board, which by the statute are required to be duplicates, are not such. One return states that the board met and canvassed the votes "on the 29th day of November, 1870," while the other states that the board met and canvassed the vote "on the 1st day of December, 1870," and the former is dated November 29 and the latter December 1.

Second. Because the vote of said county was not canvassed and the returns made out and forwarded to the State officers authorized to receive them within twenty days from the day of election, as required by statute.

Third. Because said returns were not forwarded by mail, addressed to the secretary of state and governor, as expressly required by statute, but were in fact sent in an envelope addressed to contestant, by a private messenger, and delivered to, and opened by, one W. H. Pearce, of Polk County, who afterwards placed it in the hands of the board.

These objections were considered by your committee at the last session of Congress, and it was considered by the committee very desirable to obtain more reliable evidence as to the actual vote cast in this county.

It was thought that it would be unsafe to establish a precedent of accepting as evidence a return which, instead of being transmitted from the county to the State board by mail, as the law requires, was sent by the hand of a private individual, and by him delivered to one of the candidates, to be by him delivered to the State board.

Accordingly, your committee recommended and the House, on the 29th of May last, adopted the following resolution:

"*Resolved,* That the contested-election case of Niblack *v.* Walls be continued until the next session of this Congress, and that in the meantime the parties have leave to take further evidence as to what was the true vote cast in the counties of Brevard and Manatee, and Yellow Bluff precinct, in Duval County, and also as to whether the election in said counties and in said precinct was conducted fairly and according to law."

Under this resolution the sitting Member has taken no evidence, but the contestant has called and examined E. E. Mizell, county judge, and John F. Bartholf, clerk of Manatee County, and who were two of the three canvassing officers for that county.

These witnesses each identify a paper shown them as a true copy of the return as made out by them as canvassing officers.

The copy is identical with the return which was rejected by the State board, the difference of one day between the dates of the two papers filed as duplicates being considered immaterial.

This evidence seems to be sufficient to show that the returns from this county were not tampered with, and that, notwithstanding the irregular and illegal mode adopted for their transmission from the county to the State board, they are, in fact, correct and reliable.

This return is also certified (as well as sworn to) by the clerk of the county, who, by the statute of that State, is the legal custodian of the original record of the canvass.

(3) As to the signing of the returns of Brevard County:

The statute of Florida requires that the returns shall be signed by the judge of the county court, the clerk of the circuit court, and one justice of the peace.

The return from this county relied upon as proof of the vote of the county is signed by but one of these three officers, the county judge.

The committee are of opinion that where the law requires the certificate to be made by three officers, a majority at least must sign to make the certificate evidence.

This is not a merely technical rule; it is substantial, because the refusal or failure of a majority of the board to sign the return raises a presumption that it is not correct.

It is fair to infer that if it had been free from objection a majority of the board at least would have signed it.

It is enough, however, to say that the law requires the certificate of the three officers, and all the authorities agree that at least two must certify or the certificate is inadmissible.

Therefore, as contestant did not prove the vote, the committee declined to, count the votes alleged to have been cast.

891. The case of Niblack v. Walls, continued.

The rejection of an entire poll for intimidation on behalf of contestant may add to the injury if the return gave contestee a majority.

Evidence showing that a voter's due effort to vote was thwarted by intimidation on the vote should be counted as if cast.

Evidence tending to show intimidation may be disproved by the ratio of votes cast to population.

To justify the rejection of a poll for intimidation, the evidence should be specific, not general.

Disturbance at the polls does not in the absence of specific evidence as to the effect of intimidation justify rejection of the poll.

Instance of the seating of a contestant belonging to the party in minority in the House.

(4) A question as to intimidation arose as to several precincts. The evidence convinced the committee that there was an organized effort of contestant's friends at Quincy precinct, and that it was partially successful, to intimidate voters who proposed to vote for sitting Member. This intimidation was exercised at the polls on the day of election. The contestant insisted that the only remedy was the rejection of the poll. The report says, however:

> This remedy in the present case would only add to the injury, inasmuch as the sitting Member received a majority, and this shows the necessity of some other remedy.
>
> This is to be found in the rule, which is well settled, that where a legal voter offers to vote for a particular candidate, and uses due diligence in endeavoring to do so, and is prevented by fraud, violence, or intimidation from depositing his ballot, his vote should be counted. The principle is that the offer to vote is equivalent to voting.

In two other precincts there was some evidence tending to show intimidation, but as from the ratio of votes cast to population, no unusual decrease of vote appeared, the allegations were disproved. At Lake City there was some shooting the night before election, but no actual violence at the polls. The committee say:

> It is thought by some of the witnesses that a number of voters, principally colored men, were afraid to go to the polls on election day because of these disturbances of the previous night; but as to the number of persons thus deterred, and as to what, if any, efforts they made to exercise their right, the evidence is wholly unsatisfactory. One witness puts the number at "several," while another estimates it at 40. The number who were intimidated (with or without sufficient reason) was evidently not so great as to justify the rejection of the entire poll. By the use of proper diligence the sitting Member could have called the voters themselves, or some of them, and could have thus shown their number and the facts as to their intimidation and offer and efforts to vote.

In Marianna there were disturbances, but the committee conclude:

> There were disturbances at the polls in Marianna, where three polls were opened, and where the whole county voted. One or two personal collisions occurred, some harsh language was used, and some persons were doubtless frightened away; but as to the number who left, and as to whether they left without voting, and as to the candidate for whom those who left without voting intended to vote, the evidence is wholly unsatisfactory. Several witnesses are called on the part of the sitting Member, who testify that, in their opinion, from 100 to 200 colored persons were deterred from voting; but this is a mere conjecture, and the census, already referred to, shows that it is wholly incorrect. By the census report of 1870, it appears that at the time the census was taken (which was but a short time prior to the election) there were in the county of Jackson 1,879 male citizens over the age of 21 years, and the returns before us show that 1,752 votes were actually cast, leaving only 127 voters who failed, from all causes,

to exercise their right. This is an exceedingly small percentage, being less than 10 per cent, and shows conclusively that the allegation that some 400 voters were intimidated, and thereby deprived of the privilege of voting, is not true. On the contrary, we must conclude, in view of the unusually large vote polled, that nothing can be deducted from the vote returned for the contestant on the ground of intimidation in this county.

In conclusion, in accordance with the principles set forth, the committee found a majority of 137 for Mr. Niblack, the contestant, and recommended the usual resolutions declaring sitting Member not elected, and seating contestant.

The report was considered in the House on January 29, 1873,[1] and the resolutions of the committee were agreed to without division.

Mr. Niblack then appeared and took the oath.[2]

892. The Arkansas election case of Gause v. Hodges, in the Forty-third Congress.

A return shown by testimony of the returning officer to have been made up on data rendered insufficient by theft was rejected.

The fact that a return has been accepted and acted on by State authorities does not cure its inherent defects.

Fraud will not be presumed simply from an unusual ratio between votes and population.

At the organization of the House on December 1, 1873, the Clerk did not enroll any Representative from the First district of Arkansas.[3] On February 4, 1874,[4] the House, without division, seated Mr. Asa Hodges as having the prima facie title, leaving open the right to contest.

On February 24, 1875,[5] Mr. Austin F. Pike, of New Hampshire, submitted the report of the majority of the committee on the merits of the contest of Gause v. Hodges. Mr. Edward Crossland, of Kentucky, submitted minority views. The majority and minority considered, besides questions of fact, certain questions of law.

(1) The majority reject the returns of Poinsett County, saying:

The clerk who made the certificate rebuts by his testimony (Record, pp. 342, 343) any presumption of the validity of the vote which his certificate might raise. The returns, poll books, tally sheets, and votes were all stolen from his office. He never made an abstract of the votes as required by the law of the State (acts of Arkansas, 1868, sec. 39, p. 322), and of course never made a copy of it and sent the same to the secretary of state, as required. (Ibid., p. 323, sec. 42.) He only sent a certificate founded on the affidavits of the judges of part of the voting precincts in the county. This away of making a return is substantially defective, and such a certificate can furnish no evidence of the correctness of its contents. No precinct returns and no other evidence was before the committee.

The minority say:

There are five townships in this county. The election was fairly held in all of them. The returns were made to the clerk and were stolen from his office on the Friday night after the election. The judges made certificates under oath in each precinct. These were presented to the clerk, and he made the following abstract and certificate.

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[1] Journal, p. 269; Globe, pp. 949–952.

[2] It should be noticed that contestant belonged to the party in the minority in the House and the contestee to the majority party.

[3] See case of Gunter v. Wilshire. (Section 37 of Volume I.)

[4] First session Forty-third Congress, Journal, p. 1192; Record, p. 375.

[5] Second session Forty-third Congress, House Report No. 264; Smith, p. 291; Rowell's Digest, p. 299.

Having quoted the abstract and certificate, the minority continue:

This was forwarded to the secretary of state, and he accepted it, acted on it, and counted the votes for Mr. Gause. The committee changed their opinion of the conclusive effect of a certificate that has been accepted and acted on by the State authorities" and refuse to count the vote of this county. The testimony on which the certificate was based was the best attainable after the returns were stolen from the clerk's office, was legally secondary evidence, and the committee ought to have followed the "State authorities" and given Mr. Gause the vote of this county.

(2) As to Crittenden County the following ruling is made in the majority report:

It is urged that the percentage of the voting population in this county is too large as compared with other counties, and therefore ask that fraud may be presumed. This can not furnish any reliable test, as it is well known that the proportion of the voting population in different counties and localities, as well as in States, is widely different.

The minority say:

In conclusion, we invite attention to the evidence in regard to the election in the county of Crittenden. By the census of 1870 the population of this county was 3,831 souls; in 1872 there were given 2,183 votes, of which Mr. Hodges claimed to have received 1,889. This is certainly a very uncommon ratio of voters to the population, strongly indicating fraud.

893. The case of Gause v. Hodges, continued.

Objection to the legality of the constitution of an election district not raised in the notice of contest was not considered.

An election district being established illegally, but all parties participating in the election in good faith, is considered as having a de facto existence.

The right to vote not depending on registration, and returns showing prima facie that an election, was duly held without registration, the Elections Committee counted the votes.

(3) Contestant objected that the court which, under the law, divided the county of Lincoln into election districts had no authority to act, as a quorum was not present. There seems to be no doubt that less than the legal quorum acted; but the report shows that contestant did not raise the objection in his notice of contest, and so the right to object was not open. Furthermore, the majority say:

Even if it were, it ought not to prevail. This order of the court establishing these precincts seems to have been acted on, on all hands, as a valid order. The clerk of the court acted on it and made the abstract required by law. The precincts were duly registered, officers of the election duly appointed, and an election duly held, and the returns thereof duly made. All the votes polled in these precincts for State, county, district, and municipal officers have been counted. We thin the vote for Congressmen ought not to be an exception, especially when upon the pleadings no such issue was raised. These precincts must be regarded as established under color of law and as having a de facto existence.

(4) In Monroe County a question arose as to counting votes from precincts where registration had not been completed under an order of the governor setting aside one registration and ordering a new one. The report says:

The vote of only three precincts—Troy, Pecan, and Monroe—is regarded as valid by the secretary of state. A registration was commenced; it was set aside on the ground of the alleged disturbed and violent condition of the people, and a new one ordered. Only the three precincts above named were registered under this new order. The vote of these is the only one counted by General Hadley.

The clerk of this county (p. 286 of the Record) makes an abstract of returns from the townships of Scott, Chickasaba, and Canadian, giving Gause 239 and Hodges 2.

The question presented by the pleadings and evidence is whether only these precincts are entitled to have their votes counted.

By the registration law of Arkansas (Laws of 1868, see. 23, p. 59) it is provided that—

"In any county of this State where, for any reason, a proper registration has not been made previous to any general election, the governor, when notified of the fact, shall cause a new registration to be made."

And by section 39 of chapter 73, page 222, Laws of 1868, it is provided that—

"On the fifth day after the election, * * * or sooner if all the returns have been received, the clerk of the county court shall proceed to open and compare the several election returns which have been made to his office, shall make abstracts of the votes given for the several candidates for each office on separate sheets of paper. Such abstracts, being signed by the clerk, shall be deposited in the office of the clerk, there to remain."

By section 41 of the same act the clerk is made guilty of a misdemeanor if he refuse to count the vote on any poll book returned to him.

Poll books and returns were returned for the rejected townships as well as for those counted. (See pp. 279 and 286 of Record.) It appears that there was not time to complete the new registration in all the county.

The authority of the election officers appointed by the first board of registration is not set aside by the mere order for a new registration, and their power ought to continue at least until successors are appointed by the new board. The right of a man to vote does not depend upon his registration. It does not follow, then, that there might not have been a legal election in the precincts not registered anew. The clerk's certificate is prima facie evidence that there were such elections, and the committee decide to count all the votes of this county.

894. The case of Gause v. Hodges, continued.

The return of a canvassing officer is given prima facie effect although he may have omitted from it the votes of certain precincts.

Returns made by volunteer officers at "outside polls" of votes cast by persons of unknown qualifications were rejected.

(5) As to the vote of Van Buren County, the minority views present the following statement of fact:

The device by which Gause was deprived of the vote of this county is novel and interesting. There are 19 precincts in this county. The actual vote cast, returned, and counted by the clerk was as follows: Hodges, 208; Gause, 527; whole vote, 735; majority for Gause, 319. The returns from all the precincts, except Mountain, which contained only 3 votes, were duly returned to the clerk, counted by him, and abstract made as required by law; but before he mailed it to the secretary of state he suppressed it and made another, in "obedience to instructions received from the attorney-general." Under these instructions he suppressed the vote of 11 precincts, counted only 7, giving Mr. Hodges 131 and Mr. Gause 141, making in the whole county 272 votes.

The "instructions" purported to give a rule as to votes admissible under the law. The minority say:

Admit that the instructions contained a correct interpretation of the law, the clerk does not swear that he made the alteration because he discovered irregularities in the manner the election was conducted, but made it solely because he was instructed to do it. By what data, under what evidence, he assumed that the voters of certain precincts ought to be disfranchised he does not tell us. But we insist that the clerk had no power to adjudicate upon the subject of irregularities in the precincts. All that he was authorized to do was to receive and count the votes as they were returned from the precincts and make the "abstract;" his powers began and ended with the performance of these duties. He had no authority to examine, hear, or act on any other evidence than that contained in the returns from the precincts. The majority of the committee carefully abstain from any expression of approbation in regard to what this clerk did, and insist only that he having made this second abstract and forwarded it to the governor, and the "governor and secretary of state having acted on it," it becomes the only legal evidence of the vote of the county.

The majority of the committee contended that the paper actually transmitted by the clerk, and not the other paper relied on by the contestant, was the prima facie evidence of the vote of the county. The majority say:

The committee think that the only official proof furnished by this clerk is the paper acted on by the secretary of state and the governor.

It was upon the contestant to show what the vote was in the other precinct in this county, he claiming the benefit of it. The paper he relies on does not show it for the reasons above stated.

Here, then, are certain precincts which were not returned, and which might be set up by competent proof if they were legal polls. Neither copies of the election returns or the depositions of the election officers are produced. Whatever papers were sent the clerk were rejected by him as returns, and there is no evidence what they were.

A similar question arose as to Conway County, the minority making violent objection to the decision of the majority.

(6) In Independence, Jefferson, and Woodruff counties the question of "outside polls 2" arose. The majority say:

In each of these counties, at one or more voting places, persons considering that they had a right to vote, which right had been denied them at the regular polls, and perhaps others who simply desired to vote, organized what has been called "outside polls." The persons assuming to act as officers at these outside polls made returns to the clerk of the county, and the contestant claims that the votes thus returned shall be counted.

The committee is unable to find any authority for such a proceeding in either State or national law.

The national law provides a way in the election of Congressmen and Presidential electors by which persons having the right to vote can make that right available to them when it is denied them at the regular poll. These persons did not think proper to pursue this course. They resorted to this new scheme outside the law, subversive of the purity of elections and revolutionary in the extreme.

It can not be urged that the persons making these returns are election officers. Their certificate, then, can have no legal force and can furnish no evidence that what they certify to is correct.

There is no evidence that a single one of these participants at the outside voting had any legal right to vote, and the whole claim for the allowing of the vote rests simply upon the certificate of these self-constituted and illegal officials.

The minority questioned the facts assumed by the majority, and contended that the outside polls were the legal polls.

(7) In Greene County the majority held to the following decision:

The registration was set aside in this county and no new one made. There were elections held in many or all of the precincts of the county under the registration rejected by the governor and by the officers appointed by that board of registration. The clerk of the county refused to receive the returns brought to him, and he never made any official abstract of them. He says they were "stolen."

The governor has authority to set aside a registration, but the committee does not think that a fair construction of this law can give the governor the authority to disfranchise a county by setting aside the registration.

By section 23 the governor was authorized to cause a new registration to be made only in the same manner in which the old registration was made. He was not authorized to set aside the old registration, except by making a new one. And the new one must be "governed in all respects as other regular registrations under this act" (sec. 23)—that is to say, the new precinct registration must be made between the 60th and 10th days preceding the election, and the new review must be made between the 16th and 10th days preceding the election.

In conclusion, the majority found a majority of 1,143 votes for Mr. Hodges, the sitting Member, and presented resolutions confirming his title to the seat.

The minority found a majority of 799 for Mr. Gause.

In the few remaining days of the session the report was not acted on.

895. The Georgia election case of Sloan v. Rawls, in the Forty-third Congress.

A doubt as to whether or not an election precinct existed or had been abolished did not vitiate a vote duly cast and returned.

An election being properly conducted, the House counted a return made by a portion of the election officers, the others having declined to act.

On February 27, 1874,[1] Mr. Ira B. Hyde, of Missouri, submitted the report of the majority of the committee in the Georgia case of Sloan v. Rawls. The officially tabulated vote of the district had given Mr. Sloan 6,979 votes and Mr. Rawls 8,319. But an abstract of votes actually cast, as made up by the secretary of state, showed a total of 8,350 votes for Mr. Sloan and 8,338 votes for Mr. Rawls.

The majority of the committee, besides correcting some errors and deciding certain questions of fact, joins issue on certain questions of law.

(1) The law of Georgia provided—

SECTION 1312. Such election shall be held at the court-houses of the respective counties, and if no court-house, at some place within the limits of the county site, and at the several election precincts thereof, if any, established or to be established. Said precincts must not exceed one in each militia district. Such precincts are established, changed, or abolished by the justices of the inferior court, descriptions of which must be entered on their minutes at the time.

At three precincts in Chatham County, where Sloan received 1,239 votes and Rawls 2, the returns were rejected. The majority of the committee say that these precincts should be counted.

There is no evidence tending to show that the election at these precincts was not fairly and legally conducted and the returns made and forwarded to the county managers within the time and in the manner required by the laws of Georgia; but, on the contrary, the testimony of King S. Thomas (p. 55), Avery Smith (p. 57), and James Porter (p. 58), together with the exhibits of the names of the voters referred to in their testimony, and which are printed on pages 148 to 174, inclusive, established the fact, in the opinion of the committee, that the election at these precincts was fairly and legally conducted; but it is claimed by the sitting Member that these voting precincts had no legal existence, and he gives that in his brief as the reason for the rejection of the returns from them. He says:

"The consolidators of the Chatham election refused to receive and count these votes, because they considered that there were no such precincts existing by law in Chatham County, etc."

The question of law at issue in regard to the legality of these voting precincts is simple, and may be briefly stated.

It is admitted on both sides that the ordinary of the county was authorized by the laws of Georgia to establish or abolish voting precincts by an order entered of record in his court.

And it is also admitted that these precincts were established on the 22d day of October, 1868, by the ordinary of Chatham County sitting as a court of ordinary by an order duly entered of record.

A certified copy of said order is printed on pages 174 and 175 Mis. Doc. No. 20.

Said order is as follows:

Court of ordinary, Chatham County, sitting for county purposes:

"OCTOBER 22, 1868.

"It being necessary that election precincts should be established in the county in order to facilitate the election to be held on the 3d day of November next, it is therefore ordered that election precincts be, and they are hereby, established at Cherokee Hill, in the eighth militia district, embracing the whole

[1] First session Forty-third Congress, House Report No. 216; Smith, p. 144.

of said district, at Chapman's house, in the seventh militia district, embracing the whole of said district, and on the Isle of Hope, embracing the whole of the fifth and sixth militia districts.

"HENRY S. WETMORE,
"Ordinary C. C."

In the judgment of the committee, no order abolishing these precincts had been made until about a month after the election in November, 1872.

But it is claimed by the sitting Member that the order of October 22, 1868, by which these precincts were established, applied only to the election for the year 1868, and that it does, by its terms, limit their establishment to that election.

And that appears to be the reason for the rejection of the returns from these precincts by the managers who consolidated the returns of Chatham County.

The committee is clearly of the opinion that such was not the effect of said order; that the words "it being necessary that election precincts should be established in the county in order to facilitate the election to be held on the 3d day of November next," only expressed a reason for action at that time, but did not in any manner limit the terms of the order, and much less did they have the effect of abolishing those precincts on the 4th day of November following.

It is proper to state in this connection that the sitting Member produces the testimony of the ordinary (see p. 284, Mis. Doe. No. 20), in which he states:

"It was my intention when I established these precincts to have them in force only for the election referred to."

But certainly such evidence can not be admitted to contradict or change the records of courts.

Judgments and orders of courts of record would be of little value as evidence, or for any purpose, if they could be contradicted, changed, and set aside by the testimony of the judge taken five years after the record was made.

The action of this same ordinary in abolishing these precincts in December, 1872, about a month after the election, shows how little confidence he has in his own opinion thus solemnly expressed.

It also appears by the evidence that United States supervisors of the election at all of these three precincts were appointed on November 1, 1872, by the judge of the district court of the United States for the southern district of Georgia. (See p. 179, Mis. Doc. No. 20.)

And that all of said supervisors acted, except the Democratic supervisor appointed for the Isle of Hope precinct

The argument of the minority that an act of the. legislature of Georgia had abolished these precincts is answered by the statement that this law was applicable only to one election, and did not affect the election in question.

The minority views, submitted by Mr. R. Milton Speer, of Pennsylvania, argued that the precincts had been established only for the election of 1868, and asserted that at subsequent elections these precincts had not been used.

(2) At Lawtonville the managers were all of sitting Member's party, and refused to make out and forward the return of the precinct, or even to conclude the count. But one of the managers and the clerk afterwards made out the vote and forwarded it. Testimony indicated that the election was properly conducted, and that the returned result was true. The majority held that this return, which had not been credited in the county tabulation and which showed a majority to contestant, should be counted.

The minority contended that the vote, which had not been formally returned or canvassed, should not be counted, and contended that the testimony relied on by the majority was not worthy of confidence.

896. The case of Sloan v. Rawls, continued.

There being a discrepancy between the return and the vote proven to have been cast, the House corrected the return.

Kind of proof accepted to prove votes additional to those returned for contestant at a precinct where his supporters were unable to read or write.

There being no evidence of fraud and some evidence of the correctness of the vote, the House counted a return whereon the election officers did not subscribe to the oath.

A defective precinct return, irregularly transmitted, was counted, there being no evidence of fraud and some evidence of its correctness.

(3) Contestant alleged fraud in the return from Liberty Hill, as there was a discrepancy between the vote returned for him and the vote proven to have been cast. The majority report says:

> The committee is of the opinion that this does not constitute such proof of fraud as to require them to reject the return, but that they might properly add to it such votes as the contestant proves were cast for him above the number returned.
>
> In the case of Washburn *v.* Voorhees, reported February 19, 1866, this identical question arose in relation to Jefferson Township, and the report in that case, which was adopted by the House, did not reject, but corrected, the return by giving the contestant the benefit of the votes proved in excess of those counted in the return.
>
> The evidence relied upon to prove the number of votes actually cast for Mr. Sloan at this precinct is as follows:
>
> First. A list of Republican who voted at this precinct on the day in question. This list contains 67 names, and is printed on page 129.
>
> Second. The deposition of Edmund Harper (p. 100), who was questioned, and answered as follows:
>
> "Question. Have you any knowledge of the number of Republican votes actually put in the box that day?—Answer. I saw and counted 74 that were given out to men who took them and went to the box to deposit them-"
>
> Third. The depositions of 60 Republican voters, who swear that they voted at this precinct at the election in question, receiving most, if not all, of the ballots from the vice-president or secretary of the Grant and Wilson Club, and that they all voted the Republican ticket, and all but 5 swear that they intended to vote or did vote for Mr. Sloan.
>
> As these voters were unable to read or write, the evidence is as conclusive as could be obtained under the circumstances, and the committee are of the opinion that at least a part of these votes should, if it were necessary to decide the contest, be counted for Mr. Sloan. But, in view of the length of the testimony, the few votes in issue in this precinct, and the further fact that in the judgment of the committee they could in no view of the case change the result, the committee have thought it unnecessary to make a count of them

The minority contend that the testimony relied on by contestant to prove the vote cast was unreliable because of the ignorance of the witnesses.

(4) The canvassers rejected the returns of precinct 259 of Scriven County because the managers did not subscribe to the oath. It appears that the copy of the precinct return was defective and was transmitted to the secretary of state in an irregular way. While admitting that the strict rules of law would require its rejection, the committee say that as there was no evidence of fraud and some evidence of the correctness of the vote, they would count it. This precinct gave 31 for Rawls, the sitting Member, and 4 for contestant.

(5) The majority and minority disagreed as to the vote of Jefferson precinct, the minority holding that the precinct had been abolished, and the majority contending that under proper construction of the law it could not be held to have been abolished. Considering it a legal polling place, the majority counted the vote.

897. The case of Sloan v. Rawls, continued.

Precinct returns being impeached only by the fact of suspicious custody, they were counted in spite of gross irregularities in the consolidated returns therefrom

The use of several ballot boxes, with alleged object of defeating the purpose of the Federal inspection law, did not cause rejection of the returns.

(6) The majority decided to accept the result of the precinct returns of Bullock County although the officials who consolidated the return at the county seat acted irregularly. The majority report says:

In the case of Howard *v.* Cooper (Bartlett, 275) the committee laid down the following rule in relation to cases of fraud:

"When the result in any precinct has been shown to be so tainted with fraud that the truth can not be deducible therefrom, then it should never be permitted to form a part of the canvass. The precedents, as well as the evident requirements of truth, not only sanction, but call for the rejection of the entire poll, when stamped with the characteristics here shown."

This same doctrine has been repeatedly laid down by committees, and has received the sanction of the House. (See Washburn *v.* Voorhees, Contested-Election Cases, 1865 to 1871, and cases there cited.)

The laws of Georgia, heretofore cited, require that—

"The superintendents, to consolidate the vote of the county, must consist of all those who officiated at the county seat, or a majority of them, and at least one from each precinct."

The consolidated return for Bullock County (see p. 257) has the names of six managers signed to the return and certificate, which states that—

"We do certify that we have this day met and consolidated the returns of the other voting places with the court-house, and that the following is the result, etc."

But the testimony of these men, whose names are signed to the consolidated return (see pp. 72–79), discloses the fact that not one of them ever signed or ever saw the consolidated return, or had anything whatever to do with the consolidation of the returns from that county.

Not one of them is able to tell anything about the making up of the consolidated returns; and two of them, De Loach and Proctor, decline to answer questions on the ground that the answers might tend to criminate them. This consolidated return was made up by one C. A. Sorrier (Mis. Doe. 20, pt. 2, p. 2), who was not a manager, and had no legal connection whatever with the election, and had no right to handle any of the papers.

Yet, strange as it may seem, all of the precinct returns were handed over to him as soon as they reached the court-house, and continued in his exclusive possession for many days.

He swears that he made up the consolidated return without the assistance or supervision of anybody, and signed the names of the managers to it. That consolidated return is dated on the 5th day of November, and yet it was not mailed to the executive department until the 19th of November, as appears by the testimony of the secretary of state, who examined the postmark (p. 139).

And instead of being sent by mail from Bullock County, it was, on the 11th or 12th of November (see p. 51), in the hands of one Sims, who delivered it to some party in Savannah.

It appears to have been held back until the returns from all the other counties had been received.

Another most significant fact in this connection is the failure to turn over the ballots, returns, tally sheets, and lists of voters to the clerk of the superior court, as required by the laws of Georgia before referred to.

In spite of the unlawful making up of the consolidated returns and the suspicious custody of the precinct returns, the majority concluded to count them. They gave Rawls 493 votes and Sloan 0.

The minority say on this point:

The contestant denied the irregularity of the county canvass or consolidation for Bullock County; but inasmuch as the sitting Member does not rely upon this county canvass or consolidation, but upon the precinct returns themselves, and these precinct returns, establishing the vote of the county beyond question, are presented on pages 32 to 39 of the small pamphlet, duly authenticated by the secretary of state, and wholly unimpeached, the undersigned do not see that it is material to inquire into the regularity of the canvass or consolidation. At the same time they find no such irregularity as would, under the statutes of Georgia, invalidate this canvass, even if it were the only evidence of the vote before the House. There is no testimony tending to show that the precinct officers did not sign the precinct returns. No attempt was made to show this, although an attempt was made to show that they did not make a consolidation at the county site. The contestant complained that the ordinary, Mr. Sorrier, after considerable delay, sent these returns to the secretary of state by way of Savannah. But however this may be, it would not affect the case; for his testimony, on pages 2, 3, 4, and 5 of the small pamphlet, shows how the delay occurred and why the consolidation was sent by way of Savannah; so that even if there was proof that the precinct returns accompanied the consolidation to the office of the secretary of state that would not impeach them under the evidence here.

(7) The law of Georgia, as already quoted, provided that there should not be exceeding one voting precinct in each militia district. The majority say in relation to the city of Savannah:

And it is claimed by the contestant that, in violation of this provision, four voting places were established in different parts of the court-house in Savannah.

The evidence is positive upon this point and is undisputed; four ballot boxes, at four different voting places in the court-house, were used, and were presided over by four distinct sets of managers and clerks. They were so disconnected that no man could superintend the voting at more than one box at the same time. Two of these voting places were from the streets on opposite sides of the court-house, and two were from the main passageway through its center. (See plan, p. 279.)

The act of Congress approved February 28, 1871, provides for the appointment in certain cases of two United States supervisors for each election precinct, to superintend the election.

Under that act and the act amendatory thereto, two supervisors were appointed to superintend the election at the court-house precinct in the city of Savannah.

Section 5 of that act requires the supervisors to "attend at all times and places for holding elections" and "for counting the votes," to challenge any vote offered by any person whose legal qualifications the supervisors, or either of them, shall doubt; to be and remain where the ballot boxes are kept at all times after the polls are open until each and every vote cast at said time and place shall be counted," etc.

Section 6 of the same act requires the supervisors to—

"take and occupy and remain in such position or positions from time to time, whether before or behind the ballot boxes, as will in their judgment best enable them or him to see each person offering himself for registration, or offering to vote, and as will best conduce to their or his scrutinizing the manner in which the registration or voting is being conducted; and at the closing of the polls for the reception of votes, they are, and each of them is, hereby required to place themselves or himself in such position in relation to the ballot boxes for the purpose of engaging in the work of canvassing the ballots in said boxes contained as will enable them or him fully to perform the duties," etc.

It is therefore evident that if four ballot boxes, separated as these were, can be used at one precinct, it will be impossible for the United States supervisors to perform the duties required of them by the act of Congress above referred to, and that the act can anywhere, by the managers of elections, be annulled and disregarded.

If four ballot boxes in four separate places can be legally used in one voting precinct, so can 40 or 100 in as many different places in the precinct, and any attempt at supervision would be impossible.

And it is also evident that the use of four ballot boxes, in four separate places, and with four complete sets of election officers, in what could legally be only one voting precinct, was in violation of the spirit and intention, as well as the letter, of the law of Georgia.

The committee can not refrain from noticing the attempt which was made by the authorities of Chatham County to set aside all the other voting precincts, and thereby compel the voters of the entire county either to come to the court-house or to lose the opportunity of voting.

Such a law practically disfranchises large numbers of voters, and ought to be the subject of additional legislation, so far as the election of Members of Congress is concerned.

As the rejection of the vote of the city of Savannah would not change the result in this case, the committee have not deemed it necessary to pass upon its legality, and they therefore count it as it was officially returned.

The minority say that the number of ballot boxes to be used was not prescribed by law, and that four ballot boxes had been used at this precinct for many years. The minority continue:

The use of four ballot boxes was an absolute necessity, for the statute of Georgia provides only one voting place in the entire city of Savannah; nor had any additional voting place been established by the ordinary of the county; and unless several boxes had been used at that place between 5,000 and 6,000 ballots must have been deposited by voters of the city in one box before 3 o'clock p.m., which, of course, would have been an impossibility. The contestant's proposition, therefore, disfranchises a large proportion of the voters of his district, whichever horn of the dilemma they may see fit to take. If they do not all vote in one box, they are to be disfranchised, but if they attempt to vote in one box, large numbers of them are virtually disfranchised, because they can not all vote in a single ballot box. There is an additional reason why the voters of Savannah should not be disfranchised on account of these ballot boxes. It is found in section 1362 of the Code of Georgia.

"1362. Election not void by reason of formal defects. No election shall be defeated for noncompliance with the requirements of the law if held at the proper time and place by persons qualified to hold them, if it is not shown that by that noncompliance the result is different from what it would have been had there been a proper compliance."

No attempt has been made to show anything of this kind in the case of the Savannah vote.

Moreover, the law of Georgia did not limit the number of managers. The minority further say:

Obviously there was the same imperative necessity for additional managers as for additional boxes. All the electors of Savannah were obliged to vote at the court-house, and unless more than one ballot box had been used, the election could not have been held at all. These boxes could not have been properly superintended by three managers. The boxes were arranged in a straight line in one hall and at intervals of from 10 to 16 feet, with no partition or wall or screen between them. It seems to have been the best and fairest possible arrangement to enable the citizens to vote and the managers and supervisors to perform the duties prescribed by law.

It was suggested that the use of additional ballot boxes and the employment of additional superintendents seemed to be a device to evade the acts of Congress known as the "enforcement acts," but the proof shows that this practice obtained in Savannah many years before the passage of the enforcement acts; and, besides, it is manifestly no part of the object or effect of those acts to prescribe the number of precinct officers or ballot boxes.

The report was debated in the House on March 20 and 24.[1] On the latter day the proposition of the minority that Mr. Rawls, the sitting Member, was elected and entitled to his seat was defeated, yeas 77, nays 131.

The question recurring on the resolutions of the majority, seating contestant, there appeared, yeas 135, nays 74.

Thereupon Mr. Sloan appeared and took the oath.

[1] Journal, pp. 626, 653–656; Record, pp. 2316, 2399–2412.

898. The Virginia election case of Thomas v. Davis, in the Forty-third Congress.

Instance of refusal of sitting Member's request for further time to take testimony.

On March 5, 1874,[1] the House agreed to a report from the Committee on Elections, submitting resolutions unseating Alexander M. Davis, of Virginia, and seating Christopher Y. Thomas .

The minority views, signed by Mr. L. Q. C. Lamar, of Mississippi, did not dissent from the conclusion, but held that—

as the testimony of the contestant was taken after the time allowed by law, and for this reason the contestee did not take the testimony which he alleges he otherwise would have taken, we are of the opinion that his request for further time should have been granted.

The resolutions were agreed to without division, and Mr. Thomas appeared and took the oath.

899. The Kentucky election case of Burns v. Young, in the Forty-third Congress.

Proof of mere irregularities in the administration of the election law does not justify the rejection of the votes.

The prefix "Hon." with a candidate's name is not such distinguishing mark as will justify rejection of the votes.

Where canvassing officers acted arbitrarily, although not fraudulently, the House corrected their result by the precinct returns.

On April 6, 1874,[2] Mr. Edward Crossland, of Kentucky, from the Committee on Elections, submitted the report of the committee in the case of Burns v. Young, of Kentucky. The sitting Member had been returned by an official majority of 188 votes. Contestant alleged irregularities and fraud. The committee concluded as follows:

This was the first election held under the statute of Kentucky requiring elections for Representatives in Congress to be by ballot, as directed by the act of Congress approved February 28, 1871.

The directing provisions of the act of the Kentucky legislature are very elaborate, and were not in every instance strictly complied with by officers who conducted the election. Many irregularities occurred in precincts in which contestee received majorities, and exactly similar irregularities occurred in precincts which gave majorities for contestant. And if proof of mere irregularities is sufficient to vitiate the vote in these precincts and these only counted where there was strict conformity to the Kentucky statute, the majority of the contestee would be increased. In some instances the county boards, in compliance with a provision of the statute which directs that the ballots shall have on them the name of the person voted for and no other distinguishing mark, threw out ballots cast for contestant because the word "Hon." was prefixed to his name on them. The committee are of opinion that the ballots thrown out for this reason ought to have been counted for contestant. In the county of Bracken there were thrown out because of the prefix "Hon." 36 ballots for contestant. In the county of Mason, according to the certificates of the precinct officers, Young received 1,663, Burns 1,347. The county board certify for Burns 1,338 votes, or 9 votes less than the precinct certificates aggregate. These 9 votes the committee believe ought to be counted for Burns, for the reason that the county board refused to allow any person except the members of the board to be present when the ballots were counted. Witness

[1] First session Forty-third Congress, Journal, p. 565; Record, p. 1996.

[2] First session Forty-third Congress, House Report No. 385; Smith, p. 179; Rowell's Digest, p. 290.

Hutchens swears that he asked that permission to remain in the room while the board were counting the votes and was refused by a member of the board.

The said witness Hutchens testifies that the members of said board are men of integrity and veracity; nevertheless the committee consider the practice reprehensible and dangerous and believe that contestant Burns ought to have corrected for him all the votes certified by the precinct officers, viz, 1,367.

In conclusion the committee say:

In conclusion, the committee are of opinion that, concerning the precincts wherein the irregularities were of so grave and important a nature as to affect the validity of the returns, the secondary proof of the actual votes cast shows a result not differing from that shown by the returns. In other precincts the irregularities complained of on both sides, though to be reprehended, are not of a nature to necessarily affect the validity of the returns.

The committee recommend the adoption of the following resolution:

Resolved, That John D. Young, the sitting Member, was duly elected a Representative in the Forty-third Congress from the Tenth Congressional district of Kentucky and is entitled to his seat.

On April 11[1] the resolution was agreed to by the House without debate or division.

900. The Arkansas election case of Bell v. Snyder, in the Forty-third Congress.

An affidavit of a voter as to how he intended to vote, made at the time the vote was rejected, was accepted as a valid declaration and part of the res gestae.

Oral testimony as to the making of affidavits by rejected voters was accepted as evidence of the fact and not as hearsay.

Testimony taken after the expiration of the legal time, and objected to at the time, was not admitted.

On December 23, 1874,[2] Mr. Horace H. Harrison, of Tennessee, from the Committee on Elections, submitted the report of the committee in the case of Bell *v.* Snyder, from Arkansas. The official returns had shown a majority of 104 votes for sitting Member. Various irregularities were alleged, and the committee came to conclusions as to several questions relating to facts rather than principles. Only a single important question of law was discussed and actually passed on.

The statutes of Arkansas provided for a registration to be made in each county by a board. After quoting these statutes, the report says:

It will be perceived that by virtue of these provisions every person who holds a certificate is entitled to vote until his name is stricken from the original list and his certificate revoked.

The board, when in session as a court of review, ascertain and determine who is entitled to vote, subject to appeal to the supreme court, and when they close the registration and adjourn on the sixth day they are to make fair copies of the list for the clerk of the county and for the judges of election. The original list never goes to the judges of election. The board of review exercises an arbitrary power to strike names from the list on their own knowledge of disqualifying acts and to revoke certificates already issued, but every name which is on the list when they close the registration, so as to be ready to make copies is, under the statute, a legal voter, and no power on earth can deprive him of the legal right to vote. After that no action of the board as a whole, or of any member of the board, or of any other authorities or persons can invalidate that right.

Section 30 of the election law of July 23, 1868, is in these words:

"All persons who present certificates of registration, and whose names appear on the registration

[1] Journal, p. 761; Record, p. 3009.

[2] Second session Forty-third Congress, House Report No. 11; Smith, p. 247.

books, shall be entitled to vote at any and all elections authorized by the laws and constitution of this State, and no challenge shall debar such person from voting at any election."

The proof showed that certain voters duly registered and having certificates of registration, whose names were on the original registration lists and were not stricken therefrom by any competent authority, but whose names did not appear on the precinct lists, were refused the right to vote. The committee say:

Under the law every person holding a certificate was entitled to vote until his name was stricken from the original list and his certificate revoked. The position contended for by contestant, sustained by the authorities, cited that where names appear on original registration books, but do not appear on copies furnished precinct judges, it is an error to reject the votes of such electors and that their votes are to be counted (Hogan *v.* Pile, 2 Bartlett, 285); and that votes of qualified electors should be counted (Delano *v.* Morgan, 2 Bartlett, 170; Vallandigham *v.* Campbell, 1 Bartlett, 231; Niblack *v.* Walls, Forty-second Congress) is undoubtedly correct, but in this case we are to consider the conclusiveness or sufficiency of the proof as to which of the candidates the electors who are shown to have been registered and to have held certificates would have voted for and what constitutes competent proof thereof.

The committee found it proven that certain men were duly registered and had certificates, and offered and attempted to vote for contestant, and that they made affidavit and again tendered their ballots and were refused. The affidavits made by the excluded voters were in form as follows:

STATE OF ARKANSAS, *County of Ashley:*

I, Jason C. Wilson, of the county and State aforesaid, do solemnly swear that I am a male person over 21 years of age, and have been a resident of the State of Arkansas more than six months previous to this date, and an actual resident of Ashley County, in the State of Arkansas, and am not disqualified from registering and voting by any of the subdivisions 1, 2, 3, 4, 5, and 6 of section 3 of article 8 of the constitution of the State of Arkansas; and that, on the 10th day of October, 1872, I presented myself for registration as a voter to C. W. Gibbs, president of the board of registrars for Ashley County, in said State, duly appointed by the governor of said State, and acting, and at Hamburgh, the place designated by the advertisements of the said president of said board for the registration of the voters of Carter Township, in said county, and on the day and between the hours designated in said advertisement, and did take the oath prescribed by section 5 of article 8 of the constitution of the State of Arkansas, and that I was registered by said board of registrars as a legal voter for said township, in said county, and that my name has been improperly stricken from the registration books.

JASON C. WILSON.

Sworn to and subscribed before me, an acting and duly commissioned justice of the peace for Ashley County, in the State of Arkansas, this 5th day of November, 1872.

THOS. J. WELLS, *Justice of the Peace.*

STATE OF ARKANSAS, *County of Ashley:*

I, Jason C. Wilson, of the county and State aforesaid, do solemnly swear that, upon the 5th day of November, A. D. 1872, at the general election for Representatives in Congress and Presidential electors, held at said time, I did present before the judges of election for the precinct of Carter, county of Ashley and State of Arkansas, the affidavit hereunto annexed, and upon said affidavit I did offer to vote the ticket thereunto attached; and that said judges of election in the precinct aforesaid did reject and refuse to receive the same, and to record my said vote thereunder.

JASON C. WILSON.

Sworn to and subscribed before me, an acting and duly commissioned justice of the peace for Ashley County, in the State of Arkansas, this 5th day of November, 1872.

THOS. J. WELLS, *J. P.*

A copy of the ticket was presented therewith.

The committee say that the case of Vallandigham, *v.* Campbell shows that the declaration of a voter as to how he voted or intended to vote. made at the time, is competent testimony on the point.

The statement contained in the affidavits amounted to a declaration of the voter which brought it within the rule of the case above cited. The committee continue:

These declarations are valid as a part of the res gestse; and these declarations are supported by the testimony of the supervisor, who states the fact that nearly all of these 19 voters made these affidavits when they presented their certificates, and with their ballots attached, and that they deposited them with him, as supervisor, on the day of election.

The objection that this is hearsay evidence, and that the deposition of each particular voter is the only competent evidence of the fact sought to be proven, is not well taken. The witness Butler does not prove what these 19 voters said to him, but what they did. There is a marked distinction between proof of what a party said and proof of acts of the party or facts connected with what he did. In the one case it may be hearsay testimony; in the other it is testimony as to facts which the witness observed, which is just as competent as the testimony of the voter as to facts in which he was an actor.

So the committee count for contestant the votes not received by the election officers.

In Hempstead County a person claiming to be county clerk sent in a return, which was carried into the abstract of the secretary of state. Another return from this county by a person shown by the testimony to be the legal clerk and in possession of the office, was made and showed a different result from the first return. Furthermore the evidence showed that the second return was based on a canvass of the precinct returns, while the person making the first return did not make such a canvass, and never had possession or control of the precinct returns. But the committee do not disturb the first returns for the reason—

And the committee, if there was not an insuperable objection to the admissibility of the testimony showing what has hereinbefore been stated as to this vote in Hempstead County, and in the absence of any rebutting testimony, would be inclined to put the vote of this county down as showing a majority of 315 votes for Mr. Snyder, instead of 696, as it is in the abstract certified by the secretary of state; but the testimony, showing the grounds for reducing Snyder's vote 381 votes, was taken by Mr. Bell, the contestant, after the expiration of the forty days allowed him by law for taking proof, and Snyder entered and filed his formal written protest at the time; and the committee can not sanction a practice in violation of the law, especially when exception was taken at the time to the taking of the testimony. It will be seen hereinafter that even if this proof, as to the vote in Hempstead County, was admitted (which the committee do not feel justified in sanctioning), Snyder's majority would simply be reduced.

In Drew County there were various irregularities in the precinct returns, such as failure to sign or swear to the poll books, delivery of ballots unsealed, etc. But the committee do not find it necessary to pass on the question involved, as it would not change the result.

They find as a result of their examination a majority of 462 votes for sitting Member. Therefore they recommend resolutions confirming the title of sitting Member and declaring contestant not elected.

On December 23,[1] the report was considered in the House, and the resolutions were agreed to without debate or division.

[1] Journal, p. 107; Record, p. 228.

901. The Arkansas election case of Bradley v. Hynes, in the Forty-third Congress.

The notice of contest being served after expiration of the legal time and the testimony taken without regard to the statute, the committee did not examine the case.

Payment of the expenses of a contestant by sitting Member, on condition of latter's withdrawal, was not held as a corrupt obtaining of the seat.

On June 16, 1874,[1] Mr. Austin F. Pike, of New Hampshire, from the Committee on Elections, submitted a report in the Arkansas case of Bradley *v.* Hynes. Contestant had charged that sitting Member had corruptly caused the returns to be so falsified as to reverse the true result of the election, and had further paid him (the contestant) a sum of money to abandon the contest.

Mr. Hynes denied this in a statement made under oath before the committee; but admitted that he had reimbursed contestant for his expenses when the latter proposed to withdraw.

The committee report that there was no evidence to show that contestant had been elected, but, on the contrary, there was evidence that sitting Member was entitled to a larger majority than the returns gave him. The report continues:

> His certificate of election was given him December 14, 1872, and the notice of contest was not made until the 28th of January after, and many days out of time.
>
> So, too, the depositions which Bradley had taken were commenced several days after his time had expired and with a total disregard of the statute in nearly every other particular. All of which would seem to indicate that he had something in view other than a serious contest for a seat in Congress.

As to the payment of money by sitting Member, the report says:

> While the committee regard this agreement as an act on the part of Mr. Hynes which they can not approve, they do not find that it was made for the purpose of securing his seat in Congress corruptly, nor that he had any cause to fear the result of the contest.
>
> The committee can not but regard the conduct of the memorialist as dishonorable and mercenary. If he believed he had any merit in his case, he betrayed the rights of those who gave him their suffrages. If he did not believe his contest was meritorious, his demand for money was most dishonorable.
>
> The committee have instructed me to report the accompanying resolution:
>
> *Resolved,* That the Committee on Elections be discharged from further consideration of the case of John M. Bradley against William.T. Hynes, a Member of this House from the State of Arkansas.

This report was agreed to by the House on June 16,[2] without debate or division.

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[1] First session Forty-third Congress, House Report No. 646; Smith, p. 240.

[2] Journal, p. 1193; Record, p. 5046.